

*
C.

THE
New Instructor Clericalis,
STATING
The AUTHORITY, JURISDICTION, and
MODERN PRACTICE
OF THE
Court of King's Bench.

DIRECTIONS for commencing and prosecuting Actions,
entering up Judgments, suing out Executions, and
proceeding in Error.

TO WHICH ARE ADDED,

The Rules of the Court, Modern Precedents, and several
other Matters necessary to be known by Attornies and
their Clerks,

IN TOWN AND COUNTRY.

The whole illustrated by useful Notes and Observations from
the best Authorities; with considerable Additions, in-
cluding all the Cases in Practice to the End of the last
Term; as also a copious Index.

The FIFTH EDITION, Corrected.

By JOHN IMPEY, INNER-TEMPLE.

L O N ³ D O N:

Printed for the Author, by A. STRAHAN and W. WOODFALL,
Law Printers to the KING's most Excellent MAJESTY;
And sold by WHIELDON and BUTTERWORTH, Fleet-Street.

1791.

S
4K
791
ZMP

Tx
I 342 W2

P R E F A C E

I T is now three years since the first edition of the following work was published, and was received with approval. Since that time the work has been revised much care and attention to make it still more worthy the reception of the public. In this work he has made considerable additions, and the very material of the work is so arranged and listed more in a systematic manner, and the different subjects are more fully treated, and the whole is brought down to the present time.

If any reader should find any errors, the Author would be very glad to receive notice with their acknowledgment and correction.

TO

THE HONORABLE

Sir FRANCIS BULLER, Baronet;

ONE OF HIS MAJESTY'S JUSTICES

OF THE COURT OF

K I N G ' s B E N C H ,

THE FOLLOWING WORK

IS

(BY HIS PERMISSION)

MOST RESPECTFULLY INSCRIBED,

B Y

HIS MOST OBEDIENT AND

OBLIGED HUMBLE SERVANT,

THE AUTHOR.

Count of King's Bench

P R E F A C E.

IT is now three years since the *Fourth Edition* of the following Work made its appearance, and was received by the Profession with approbation; since which, the Author has employed much time and attention to make it still more worthy the reception it has met with.—In this Work he has made considerable additions, as also very material alterations.—The cases cited are stated more at large, with the names from the different reporters.—The new rules of court are also inserted, and the adjudications continued down to the end of the last term.

If any inaccuracies should yet remain, the Author trusts that the Profession will view them with their accustomed liberality and candor.

The

P R E F A C E.

The Author cannot conclude without returning thanks to *Master Benton* and *Mr. Forster*, for much useful information he has derived from them in the present, as well as the former Editions, and for the very liberal manner in which it was communicated.

THE

C. A. Dunlop

THE
Authority and Jurisdiction
OF THE
Court of King's Bench.

THE primary objects of the law are the *establishment of rights*, and the *prohibition of wrongs*; and to accomplish the *redress of injuries*, courts of justice are instituted in every civil society, in order to protect the *weak* from the insults of the *stronger*, by expounding and enforcing those laws, by which *rights* are defined, and *wrongs* prohibited. This remedy is therefore principally to be sought by application to these courts of justice, which, in all instances of an injury being committed, either inflicts a punishment on the *offender*, or gives a *recompense* to the *person injured*.

A court is defined to be a place wherein justice Court defined, is duly administered. *Co. Lit.* 58. And as, by our excellent constitution, the sole executive power of the laws is vested in the person of the king, it will follow, that all courts of justice, which are the *medium* by which he administers the laws, are derived from the power of the crown. For whether created by act of parliament, letters patent, or subsisting by prescription (the only methods by which any court of judicature can exist), the king's consent in the two former is expressly, and in the latter impliedly given. In all these courts the king is supposed, in contemplation of law, to be always present; but as that is in fact impossible, he is
B there

The Authority and Jurisdiction of

there represented by his judges, whose power is only an emanation of the royal prerogative.

For the more speedy, universal, and impartial administration of justice between subject and subject, the law hath appointed a prodigious number of courts, some with a more limited, others with a more extensive jurisdiction; some constituted to inquire only, others to hear and determine; some to determine in the first instance, others upon appeal, and by way of review.

Courts of record.

All courts of record are the king's courts, in right of his crown and royal dignity, and therefore no other court hath authority to fine or imprison; so that the very erection of a new jurisdiction with power of fine or imprisonment, makes it instantly a court of record. *Finch's Law.* 235. *Salk.* 200. 12 *Mod.* 388. The courts of Westminster are the superior courts of the kingdom, and have a superintendency over all other courts by prohibitions, if they exceed their jurisdiction, or writs of error, and false judgment of their proceedings. *Carth.* 11, 12.

By Saxon constitution only one superior court.

By the ancient Saxon constitution, there was only one superior court of justice in the kingdom: and that had cognizance both of civil and spiritual causes, viz. the *wittenagemote*, or general council, which assembled annually, or oftener, wherever the king kept his *Easter*, *Christmas*, or *Whitsuntide*, as well to do private justice as to consult upon public business: And at the conquest, the ecclesiastical jurisdiction was diverted into another channel. The conqueror fearing danger from those annual parliaments, established a constant court in his own hall called by ancient authors *aula regia*, or *aula regis*, which was composed of the king's great officers of state resident in his palace, and attendant on his person, assisted by certain persons learned in the laws; all of whom had a seat in the *aula regia*, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. All these, in their several departments, transacted all secular business both criminal and civil, and likewise matters

matters of the revenue; and over all presided one special magistrate, called the *chief justiciar*, or *capitalis justiciarius totius Angliæ*, who was the principal minister of state, the second man in the kingdom, and by virtue of his office guardian of the realm in the king's absence. And this officer it was, who principally determined all the vast variety of causes that arose in this extensive jurisdiction; and, from the plenitude of his power, grew at length obnoxious to the people, and dangerous to the government which employed him. *Spil. Gloss. 331, 332, 333.*

This great universal court being bound to follow the king's household in all his progresses and expeditions, the trial of common causes therein was found very burthenfome to the subject: wherefore king John, who dreaded also the power of the *justiciar*, very readily consented to that article which now forms the eleventh chapter of *magna carta*, and enacts, "*That communia placita non sequantur curiam regis, sed teneantur in aliquo loco certo.*" This certain place was established in Westminster-hall, the place where the *aula regis* originally sat, when the king resided in that city, and there it hath ever since continued. And the court being thus rendered fixed and stationary, the judges became so too; and a chief, with other justices of the common pleas, was thereupon appointed, with jurisdiction to hear and determine all pleas of land, and injuries merely civil between subject and subject.

The court of king's bench bound to follow the king.

The *aula regia* being thus stripped of a considerable branch of its jurisdiction, and the power of the *justiciar* being also considerably curbed by many articles in the great charter, the authority of both began to decline apace under the long and troublesome reign of king Henry the third. And in further pursuance of this example, the other several offices of the chief *justiciar* were, under Edward the first (who new-modelled the whole frame of the judicial polity), subdivided and broken into distinct

The *aula regia* stripped of a branch of its jurisdiction.

The Authority and Jurisdiction of

courts of judicature. A court of chivalry was erected, over which the constable and marshal presided; as did the steward of the household over another, constituted to regulate the king's domestic servants. The high steward, with the barons of parliament, formed an august tribunal for the trial of delinquent peers; and the barons reserved to themselves in parliament the right of reviewing the sentences of other courts in the last resort. The distribution of common justice between man and man was thrown into so provident an order, that the great judicial officers were made to form a cheque upon each other, the court of chancery issuing all original writs under the great seal to the other courts; the common pleas being allowed to determine all causes between private subjects; the exchequer managing the king's revenue; and the court of king's bench retaining all the jurisdiction which was not cantoned out to other courts, and particularly the superintendence of all the rest by way of appeal; and the sole cognizance of pleas of the crown, or criminal causes.

Court of K. B.
is the supreme
court.

The court of king's bench is the supreme court of common law in the kingdom; and is so called, because the king used formerly to sit there in person; it consists of a chief justice and three *puisne justices*, who are by their office the *sovereign conservators of the peace, and supreme coroners of the land*. Yet, though the king himself used to sit in this court, and still is supposed to do so, he did not, neither by law is he empowered to determine any cause or motion, but by the mouth of his judges, to whom he hath committed his whole judicial authority.
4 *Inst.* 71. 73.

This court a
remnant of the
aula regia.

This court is the remnant of the *aula regia*, and is not, nor can be, from the very nature and constitution of it, fixed to any certain place, but may follow the king's person wherever he goes; for which reason all process by original, issuing out of this court in the king's name, is returnable "*ubicunque fuerimus in Anglia.*"

For

For some centuries past it hath usually sat at *Westminster*, being an ancient palace of the crown; and we find that after *Edw. 1.* had conquered *Scotland*, it actually sat at *Roxburgh*. *Hal. Hist. C. L.* 200. Usually sat at Westminster.

It is termed the *custos morum* of all the realm, and by the plenitude of its power, wherever it meets with an offence contrary to the first principles of justice, and of dangerous consequences (if not restrained), adapts a proper punishment to it. Termed the custos morum of the realm.
2 Haw. Pl. C. 6. Sid. 168.

It has a peculiar jurisdiction, not only over all capital offences, but also over all other misdemeanors of a publick nature, tending either to a breach of the peace, or to oppression or faction, or any manner of misgovernment; and it is not material whether such offences being manifestly against the publick good, directly injure any particular person or not. *4 Inst. 71. 11 Co. 98. 2 Haw. P. C. 6.* It has a discretionary power of inflicting exemplary punishment on offenders, either by fine, imprisonment, or other infamous punishment, as the nature of the crime, considered in all its circumstances, shall require. *2 Haw. 7.* Also this court, by the plenitude of its power, may as well proceed on indictments removed by *certiorari* out of inferior courts, as on those originally commenced here, whether the court below be determined, or still *in esse*, and whether the proceedings be grounded on the common law, or on a statute making a new law concerning an old offence. *9 Co. 118. 2 Inst. 549. Crompt. Juris. 131.* But before allowance of a *certiorari*, the defendant must find sureties to appear and plead, and to procure the issue to be tried the next assizes, or next term after such *certiorari* granted, or sitting after the said term, and give due notice thereof, and appear from day to day in the said court, and not depart the same until discharged. *Stat. 5 W. & M. c. 11. and 8 & 9 W. 3. c. 33.* And if defendant removes the indictment, he must pay costs, if convicted, to be taxed to the prosecutor within ten days after demand made, and

refusal of payment on oath, otherwise an attachment to be granted. 5 & 6 W. & M. c. 11. 6 Mod. 246.

The jurisdiction.

The jurisdiction of this court is so very high and transcendent, that it keeps all inferior jurisdictions within the bounds of their authority; and may either remove their proceedings to be determined here, or prohibit their progress below: it superintends all civil corporations in the kingdom: commands magistrates and others to do what their duty requires in every case, where there is no specific remedy: protects the liberty of the subject, by speedy and summary interposition: takes cognizance both of *criminal and civil* causes; the former in what is called the *Crown Side* or *Crown Office*; the latter in the *Plea Side* of the court. The jurisdiction of the crown side is not intended to be here treated of. But on the civil or plea side it hath an original jurisdiction and cognizance of *all actions of trespasss, or other injury alledged to be committed vi et armis: of actions for forgery of deeds, maintenance, conspiracy, deceit, and actions on the case, which alledge any falsity or fraud; all of which savour of a criminal nature, although the action is brought for a civil remedy, and makes the defendant liable in strictness to pay a fine to the king, as well as damages to the injured party. Finch, 198.* The same doctrine is also extended to all actions on the case whatsoever (*except real actions*), and has continued to do so for ages; it being surmised that the defendant is arrested for a supposed trespasss, which he never has in reality committed; and being in the custody of the marshal of this court, the plaintiff is at liberty to proceed against him for any other personal injury; which surmise the defendant is not at liberty to dispute. These fictions of law, on consideration, are highly beneficial and useful, especially as this maxim is ever invariably observed, *That no fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law.* 3 Rep. 30. 2 Roll. Rep. 502. Co. Litt. 150. 11 Rep. 55.

Fictions.

This

This court, as it is the highest court of common law, hath not only power to reverse erroneous judgments for such errors as appear the defect of the understanding, but also to punish all inferior magistrates, and all officers of justice, for wilful and corrupt abuses of their authority against the obvious principles of natural justice. 2 *Haw. P. C.* 8. *Vaugh.* 157. *Salk.* 201. *pl.* 3. Highest court of common law.

Newgate is as much the prison of this court as the king's bench prison is : every prison in the kingdom is the prison of this court. *Rex v. Davis.* 1 *Burr.* 641. Prison.

It is a court of appeal, into which may be removed, by writ of error, all determinations of the court of common pleas, and of all inferior courts of record in England. Yet even this court is not the dernier resort of the subject : for, if he be not satisfied with any determination here, he may remove it by writ of error into the court of exchequer chamber, if the proceedings are by bill, or into the house of lords if by original. Court of appeal.

It grants an *habeas corpus* to relieve persons wrongfully imprisoned; and upon return of the cause, they may be bailed or discharged as the court shall think fit : Also *mandamus's* to inferior courts to oblige them to do their duty, prohibitions to keep them within their proper jurisdiction. Grants a hab. corp.

As the inferior courts, which are not of record, regularly cannot hold plea of debt, &c. or damage, unless under 40s; so the superior, which are of record, cannot unless above 40s. 2 *Inst.* 311. *Stat.* 6 *Ed.* 1. c. 8. For the wisdom of the common law was, that men should not be troubled for suits of small value in the king's courts, there being inferior jurisdictions established, in order to bring justice home to every man's door. *Ibid.* Cannot hold plea for less than 40s.

By *stat.* 43 *Eliz.* c. 6. it is enacted, " That if any personal action be brought in any of her majesty's courts at Westminster (not being for any title or interest of lands, nor concerning the free- No costs if the debt or damage amount to less than 40s.

“ *bold or inheritance of any lands, nor for any battery*), it shall appear to the judges of the same court, and be so signified by the justices before whom the same shall be tried, that the debt or damages to be recovered therein, shall not amount to the sum of 40s. that in every such case the judges or justices before whom such action shall be pursued, shall not award the plaintiff any more costs than the sum of the debt or damages so recovered shall amount to ; but less at their discretion.”

Debt lies under
40s.

If upon a nonsuit in an inferior court, 16s. is given for costs, by 23 H. 8. c. 15. debt lies for it in this court, because given by a subsequent statute to the statute of Gloucester. *Cro. Eliz.* 96. *Leon.* 316.

Style of the
court.

The style of the court is, “ *Pleas before our lord the king at Westminster, of the term of Saint Michael, in the thirty second year of the reign of our sovereign lord George the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith—And in the year of our Lord 1791.*”

Two ways of
proceedings in
this court.

In this court there are two ways of proceeding, viz. by *original writ*, or by *bill*; the former is generally used in case the debt is large, because the defendant, if he means to delay execution of the judgment, must bring his writ of error returnable in parliament, which greatly enhances the expence; but the latter is the more expeditious.

If privilege.

If the party is privileged as an attorney, or other person intitled to privilege, this court holds plea on a writ of privilege, which is the first process, issued against the defendant, to compel him to appear, and make his defence.

Attornies, &c.

If attornies, officers or ministers of this court, are sued by persons not intitled to privilege, they must be sued by bill, which expresses either the grievance or wrong which the plaintiff hath suffered by the defendant, or some fault by him committed against some law or statute of the realm.

Also

Also a *peer*, (*Cowper, Rep.* 184.), *knight*, *citizen*, *Peers*, &c. or *burghes*, or other person intitled to privilege of parliament, may be sued in this court by *original writ*, or by *original bill*, in manner as directed by the *Stat. 12 & 13 Will. 3. c. 3.* upon which a writ of *summons* and *distingas* may issue to compel his appearance: But no writ of *summons* will lie against a person not intitled to privilege, on a bill filed against him in this court; though many have attempted that mode of proceeding, which has been set aside with costs.

Actions.

IT has been already observed, that, the more effectually to accomplish the redress of private injuries, courts of justice were instituted in every civilized society, in order to *protect* the *weak* from the insults of the *stronger*. The remedy therefore principally to be sought by application to these courts of justice is by *civil action*, which is the form of a suit given by law, for the recovery of that which is due to the person applying, and invented to preserve men's persons and properties from the violence and injustice of others; whereby the suitors are obliged to submit to the public the measure of their damages: For were they allowed to be their own carvers, or to make reprisals, which they might do in the state of nature, such permission would introduce all that inconvenience which the state of nature did endure, and which government was at first invented to prevent.

In every action that is brought, the person complaining is called the *plaintiff*; and the person who is called upon to make satisfaction, is called the *defendant*.

If two actions are brought by the same plaintiff at the same time, for causes which may be joined, and the defendant is holden to bail in both, the court

Consolidating
actions.

court will compel the plaintiff to consolidate them, and pay the costs of the application. *Cecil v. Burges, Term Rep. 2 V. 639.*

Criminal.

They are either *criminal* or *civil*. *Criminal*, which lies for some penalty or punishment in the party sued, be it corporal or pecuniary; therefore called actions penal.

Popular actions.

Popular actions, where a man hath committed a breach of some penal statute; and so called, because it is not given to one *pecially*, but *generally* to any that will prosecute, as well for himself as the king, and is generally called a *qui tam* action, because it is brought by a person *qui tam pro domino rege, &c. quam pro seipso in hac parte sequitur*. Dy. 95. *Lut. 133.*

When statute must be rehearsed.

If an action lies for an offence at common law, and afterwards a statute is made against the same offence, if the action is brought upon the statute, the statute must be rehearsed; otherwise it doth not appear, whether the action be upon the statute, or at common law. *Lut. 1548.* So, if a statute make a new offence, which was not so by the common law, the statute must be recited, as in waste against tenant for life or years. *Ibid.*

But if it extend a remedy.

But if a statute extend a remedy, which was at common law in some particulars, it need not be recited. *Dy. 83. b. 85. a. b.* As in waste against a tenant in dower or guardian, the statute need not be rehearsed; for here was a prohibition of waste against them at common law. *Ibid. Reg. 73.*

The day, &c. material.

If an act of parliament be recited or pleaded, the *day*, *year*, and *place* of making it must be shewn. It is sufficient that so much of a statute is recited, as concerns the matter in question; and therefore if it be said *inter alia inactitatum fuit*, it is well. *Plow. 65. a.* If the party recites so much as makes for him, it is sufficient; though he omit a proviso or other clause, that makes against him. *2 Cro. 139. Plow. 105. a.* A material variance is bad. *Lut. 140.* So if he misrecite the title. *2 Salk. 602. Mod. Caf. 62, 3.*

Recital of so much as makes for him sufficient.

Civil actions are divided into *real*, *personal*, and *mixed*. *Real*, which concern real property only, are such whereby the plaintiff, or demandant, claims title to any lands or tenements, rents, commons, or other hereditaments, in fee simple, fee tail, or for term of life: but these actions are now laid aside, being very dilatory and expensive; and a more commodious method is contrived to dispute the title of lands, called an ejectment. *Co. Lit.* 284. 2 *Inst.* 40. Civil actions divided.

Personal actions, are *account*, *assumpsit*, *covenant*, *Personal. debi, detinue*, *assault and battery*, *false imprisonment*, *case*, and *trespass*.

Mixed actions, are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained; as for instance, ejectment, which intitles the plaintiff not only to restitution for the term of years, but also damages for the wrong: waste not only to recover the land wasted, but also treble damages, which is a personal recompense; and under these three heads may every species of remedy, by suit or action, be comprized. Mixed actions.

By the common law, *account* lay only against a *Account. guardian in socage*, *bailiff* or *receiver*, or by one in favour of trade and commerce, naming himself merchant, against another naming him merchant; and for the executors of a merchant; for between these there was such a purity, that the law presumed them conuzant of each other's disbursements, receipts and acquittances. *Co. Lit.* 172. a. 11 *Co.* 90. a. 2 *Roll. Abr.* 161. 2 *Inst.* 404.

The stat. 13 *Ed.* 3. *ch.* 13. gives an action to the executors of a merchant. The 25 *Ed.* 3. *st.* 5. c. 5. to executors of executors. The 31 *Ed.* 3. c. 11. to administrators; and by the statute 4 *Ann.* c. 16. *sect.* 27. actions of account may be brought against the executors and administrators of every guardian, bailiff, and receiver, and by one joint-tenant, tenant in common, his executors, &c. against

against the other as bailiff for receiving more than his share, their executors, &c.

A *bailiff* cannot be charged as *receiver*, because if he be charged as *bailiff* upon his account, he shall have allowance of his charges and expences, which he is not intitled to when he is charged as *receiver*; also he is not allowed, in an action brought against him as a *receiver*, to plead that he was before charged as receiver. *Roll. Abr.* 119.

By *bailiff* is understood a servant that hath administration and charge of lands, goods, and chattels, to make the best benefit for the owner, against whom an action of account doth lie for the profits which he hath raised or made, his reasonable charges and expences deducted. *Co. Lit.* 172. a.

A *receiver* is one who receiveth the money, and is to render an account of it, but is not allowed any charges or expences but what is agreed on by the parties; and in this case the plaintiff is to declare by *whose hands* he received it. *Ibid.*

An action of account lies not for a thing certain: as if a man deliver 10*l.* to *B.* to merchandize with, he shall not have account of the 10*l.* but of the profits which are uncertain. *Bro.* 355. 2 *Brownl.* 76.

If the bailee of goods waste them, or refuse to deliver them, no action of account lies, but *detinue*, or *trover*. *Roll. Abr.* 116. *Owen*, 86.

Where assumpsit will lie as well as account. *Salk.* 9.

Pleading in account.

It is a rule in pleading in an action of account, that whatever matter which can be pleaded in bar to the action, must be so pleaded; and that whatever matter which may be pleaded in bar, cannot afterwards be pleaded before the auditors. *Sty.* 411. *To avoid trouble and charge to the parties.*

Except in case of a release, or *plene computavit*; if the party is once chargeable and accountable, he cannot plead in bar, but must plead before auditors; these exceptions are because a release, and having fully accounted, are total extinctions of the right of action, which the court is to judge of; and even in those two cases, they must plead specially, and cannot

not be given in evidence on *ne unques receiver*. *Brownl.* 24, 25.

Nothing can be pleaded before auditors, contrary to what has been pleaded before, and which has been found by verdict; because it would introduce either contrary verdicts, or two verdicts of the same, which is absurd. *Vide 3 Wils. 114. Godfrey v. Saunders.*

Assumpsit in law, is a naked contract; or a voluntary promise by word of mouth, by which a man assumes and takes upon him to perform and pay any thing to another. This term comprehends any verbal promise; and is variously expressed by the civilians, according to the nature of the promise; sometimes by *pactum*; sometimes by *promissio*, *pollicitatio*, or *constitutum*. Assumpsit in law.

An *assumpsit* is an action the law gives a party injured by the breach or non-performance of a contract legally entered into; it is founded on a contract either *express*, or *implied* by law, and gives the party damages in proportion to the loss he has sustained by the violation of the contract. *4 Co. 92. Moor, 667.* But here it must be observed, that the law distinguishes between a *general indebitatus assumpsit*, and a *special assumpsit*; for tho' they come under the denomination of actions on the case, yet the first seems to be of a superior nature, and will lie in no case but where debt will lie. *2 Ld. Raym. 1034;* but for a particular undertaking, or collateral promise to discharge the debt or duty of another, a *special assumpsit* must be brought.

A promise is in the nature of a verbal covenant, and wants nothing but the solemnity of writing and sealing to make it absolutely the same. If therefore it be to do any explicit act, it is an *express contract*, as much as any *covenant*; and the *breach* of it is an *equal injury*. The remedy is an *action upon the case*, for what is called an *assumpsit* or *undertaking* of the defendant; the failure of performing which is the wrong or injury done to the plaintiff, the damages whereof a jury are to estimate and settle. As if a builder promises, undertakes, or assumes Promise, what.

assumes to *A.* that he will build and cover his house *within a time limited*, and fails to do it; *A.* has an action against the builder for this breach of his *express promise, undertaking, or assumpsit*; and shall recover a *pecuniary satisfaction* for the injury sustained by such delay. So also if a debt by simple contract be due, if the debtor promises to pay it and does not, this breach of promise intitles the creditor to his action *on the case*, instead of being driven to an action of *debt*. 4 Rep. 92.

Some agreements indeed, though never so expressly made, are deemed of so important a nature, that they ought not to rest in verbal promise only, which cannot be proved but by the memory of witnesses. To prevent which, the statute of frauds and perjuries, 29 Car. 2. c. 3. enacts, that in the five following cases *no verbal promise* shall be sufficient to ground an action upon, but at the least some *note or memorandum* of it shall be made *in writing*, and signed by the party to be charged therewith: 1. *Where an executor or administrator promises to answer damages out of his own estate.* 2. *Where a man undertakes to answer for the debt, default, or miscarriage of another.* 3. *Where any agreement is made, upon consideration of marriage.* 4. *Where any contract or sale is made of lands, tenements, or hereditaments, or any interest therein.* 5. *And, lastly, where there is any agreement that is not to be performed within a year from the making thereof.* In all these cases a mere verbal *assumpsit* is void.

Nudum pactum

As men have a right to their acquisitions, so may they dispose of them at their pleasure, and without valuable consideration; but if a man promise to convey land, or to give goods without valuable consideration, or without delivering possession of them, this alters no property, nor has the party any remedy in law or equity, being *nudum pactum unde non oritur actio*. 6 Co. 18. b.

Consideration,
when void.

Consideration is defined a cause or occasion meritorious, that requires a mutual recompence in fact or in law. Therefore if a man promises so much money

money, at a day to come, to build a house or a church, without consideration, this is a naked promise, and will not oblige. *Doct. & Stud.* 213.

Roll. Abr. 9, 10.

Also idle and insignificant considerations are Void promise. looked upon as none at all; for wherever a person promises *without a benefit arising to the promisor, or loss to the promisee*, it is looked upon as a void promise. *2 Bulstr.* 269.

A consideration altogether executed and past, is not good to maintain an *assumpsit*; but if it were moved by a *precedent* request it is good, and doth amount to a promise, *Roll. Abr.* 11, 12. for it is not reasonable that one man should do another a kindness, and then charge him with a recompence.

As all considerations are deemed insignificant and void, that are not of some benefit to the promisor, or loss to the promisee, so if they are *wicked* and *ill* in themselves, or *unlawful* by being prohibited by some act of parliament, they are void. *Roll. Abr.* 16. Unlawful consideration.

Assumpsit lies in many cases where debt lies, and in many where debt doth not lie. *2 Burr.* 1008.

Implied contracts, are such as do not arise from the express determination of any court, or the positive direction of any statute; but from natural reason, and the just construction of law: which extends to all presumptive *undertakings* and *assumpsits*; which, though never perhaps actually made, yet constantly arise upon this general implication and intendment of the courts of judicature, *that every man hath engaged to perform what his duty or justice requires*. Thus, if I employ a person to transact any business for me, or perform any work, the law implies that I undertook, or assumed to pay him so much as his labour deserved. And if I neglect to make him amends, he has a remedy for this injury, by bringing his action on the case upon this *implied assumpsit*; wherein he is at liberty to suggest, that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has

Implied assump-
sit.

has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury; who will assess such a sum in damages as they think he really merited. This is called an *assumpsit*, on a *quantum meruit*. There is also an *implied assumpsit*, or a *quantum valebat*, which is very similar to the former; being only where one takes up goods or wares of a tradesman, without expressly agreeing for the price. There the law concludes, that both parties did intentionally agree, that the real value of the goods should be paid; and an action on the case may be brought accordingly, if the vendee refuses to pay that value.

Another species
of implied as-
sumpsit.
Money had and
received.

Another species of *implied assumpsit* is, when one has had and received money belonging to another, without any valuable consideration given on the receiver's part: for the law construes this to be money had and received for the use of the owner only; and implies, that the person so receiving *promised and undertook to account for it to the true proprietor*. And if he *unjustly detains it*, an *action on the case* lies against him for the *breach of such implied promise and undertaking*; and he will be made to *repair the owner in damages, equivalent to what he has detained in such violation of his promise*. This is applicable to almost every case where the defendant has received money, which *ex æquo et bino* he ought to refund. 2 Burr. 1012.

If the defendant be under an *obligation*, from the ties of *natural justice*, to *refund*; the law *implies a debt*, and gives an action for money had and received, founded on the equity of the plaintiff's case, as it were upon a contract (*quasi ex contractu*) as the Roman law expresses it. 2 Burr. 1008.

This species of *assumpsit* lies in numberless instances, for money the defendant has received from a *third person*; which he claims title to, in opposition to the plaintiff's right; and which he had by law authority to receive from such third person. *Ib.*

Benefit of the
action.

One great benefit, which arises to suitors from the nature of this action, is, that the plaintiff need not state

state the special circumstances, from which he concludes; "that *ex æquo et bono*, the money received by the defendant, ought to be deemed as belonging to him: he may declare generally, that the money "was received to his use;" and make out his case at the trial. 2 Burr. 1010.

This is equally beneficial to the defendant. It is the most favourable way in which he can be sued: he can be liable no further than the money he has received; and against that may go into every equitable defence upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by every thing, which shews that the plaintiff, *ex æquo et bono*, is not intitled to the whole of his demand, or to any part of it. *Ib.*

If the plaintiff elects to proceed in this favourable way, it is a bar to his bringing an action upon the agreement; though he might recover more upon the agreement, than he can by this form of action. *Ib.* It lies only for money which, *ex æquo et bono*, the defendant ought to refund; it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him in any course of law; as in payment of a debt barred by the statute of limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play; because the defendant may retain it with a safe conscience, though, by positive law, he was barred from recovering. But it lies for money paid by mistake, or upon a consideration which happens to fail; or for money got through imposition (express or implied) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. *Moses v. Macfarlan*, 2 Burr. 1012.

Where an annuity bond granted by two becomes void by the neglect of the grantee, in not registering a memorial under the statute 17 Geo. 3. c. 36. Annuity bond if not registered cannot recover against the security.

Defence.

Disadvantage of the action.

When it lies and when not.

When lies.

c. 36. s. 4. the plaintiff cannot recover back any part of the consideration money from the one who was known only to be a surety for the other, and had not in truth received any part of it, notwithstanding they both joined in signing a receipt for it. For a receipt is not conclusive evidence against the party who signs it. *Stratton v. Rastall* and another, *Term Rep. 2 V. 366*. In order to recover the money in this form of action, the party must shew that he has equity and conscience on his side, and that he could recover it in equity. Mr. Justice Buller, *Ibid. 370*. This action must be brought against the principal, and not the collector. 4 Burr. 1984. *Sadler v. Evans*.

This action will lie to recover premiums of insurance paid by the insured to the lottery-office-keeper. *Cowp. Rep. 790. Browning v. Morris*. But it will not lie to recover back winnings paid by the lottery-office-keeper, or insurer of lottery tickets. *Ibid.*

Also it lies for a creditor's share under an order of commissioners of bankrupt for a dividend against the assignees. *Brown v. Bullen. Dougl. Rep. 407.*

Lies for money
paid by mistake.

It also lies for money paid by mistake, or on a consideration which happens to fail, or through imposition, extortion, or oppression; or where undue advantage is taken of the plaintiff's situation. 4 Burr. 1012. For money laid out and expended for the use of another, the law implying a promise of re-payment, and upon an account stated. *Carth. 466.*

Stock-jobbing

If two persons engage jointly in a stock-jobbing transaction and incur losses, and employ a broker to pay the differences, and one of them repay the broker with the privity and consent of the other the whole sum, he may recover a moiety from the other in an action for money paid to his use. *Petrie v. Hannay. 3 Term Rep. 418.*

If one partner
pay for another.

But in such a case of an illegal transaction, if one partner pay money for another, without an express authority, he cannot recover it back. *Ibid.*

Covenants,

Covenants, contracts, and agreements, are often ^{Covenants.} used as synonymous words, signifying an engagement entered into, by which one person lays himself under an obligation to do something beneficial to, or to abstain from an act, which, if done, might be prejudicial to another.

As the good of society requires a punctual performance of, and that no person should be allowed to rescind and break through his contracts, so the law has provided a remedy by action of covenant, in which the injured party is to recover damages for the violation of the contract in proportion to the loss he has sustained.

Covenant lies where a man covenants with another, ^{Covenant, when} by deed, to do something, and does it not. *Fitz. lies.* *N. B. 145.* And it lies upon a covenant in any deed indented, or poll. *1 Roll. 517. l. 40.*

Covenant lies for the recovery of *damages* upon contracts by *deed*, as upon articles of agreement, charter parties of affreightment, indentures of apprenticeship, leases, mortgages, &c.

But does not lie upon an agreement without deed; When not, but an action on the case. *F. N. B. 145. 341*

It lies not on a lease made by the committee of a ^{Lunatick.} lunatick, for he cannot make a lease at law. *Knipe v. Palmer, 2 Wils. 130.*

If a man covenants with *B.* to do a personal ^{By an executor.} thing, and dies; his executor or administrator shall have covenant upon it. *F. N. B. 145. 341.*

So where the covenant relates to the inheritance, ^{Heir.} the heir may have an action upon it. *1 Roll. 520. l. 42.*

So by the common law, upon a covenant in law, ^{Assignee.} the assignee of the estate shall have an action. *Dy. 257. 5 Co. 17. a. Mo. 419. 4 Co. 80. b.*

If a man covenants with *B.* and dies, an action ^{Against exe-} lies against his executor or administrator upon it, ^{cutors.} though he be not named in the covenant. *1 Roll. 519. l. 35. 40. Cro. Eliz. 553.* So in all cases, an executor is bound by a covenant, if it does not

determine by the death of the covenanter. 2 *Mo.* 269. 1 *Roll.* 519. l. 33. So if he covenants for him and his assigns: for an executor or administrator is an assignee. *Mo.* 44. But it does not lie if a covenant be for a personal act of the testator, if the breach be not in his lifetime.

Against heirs.

If he covenants for him and his heirs, covenant lies against the heir. *Lut.* 287.

When assignee liable.

If a man covenants to do a thing, which has existence at the time of the demise, and relates to it; the covenant runs with the land, and binds the assignee, though he be not named: as, if he covenants to pay the rent reserved, to repair the house demised. 5 *Co.* 16. b. 24. b. *Cro. Eliz.* 457. 552. 1 *Roll.* 521. l. 37.

Lessee of tithes.

Covenant from lessee of tithes for himself or assigns, not to let the farmers have the tithes, runs with the tithes and binds the assignee. *Bally v. Wells,* 3 *Will.* 25.

When assignee not liable.

If lessee covenants to pull down old houses, and build new on the ground in seven years, and does not, but after seven years assigns; assignee is not liable, for the covenant does not run with the land. *St. Saviour's v. Smith,* 3 *Burr.* 1271. For it was broken before the assignment. 1 *Salk.* 199.

Debt, in what cases it lies.

Debt lies on an obligation, or any other deed or specialty on a judgment, within or after the year after recovery. 43 *Ed.* 3. 2. b.

It lies in *C. B.* upon a judgment in *scire facias* upon a recognizance in *B. R.* *Dy.* 306. a. in *Marg.*

So in *B. R.* upon a judgment in *C. B.* removed thither by error. 1 *Sid.* 236.

So it lies there upon a judgment there after error brought in the exchequer. 1 *Sid.* 236. *Lut.* 602. 1 *Lev.* 153. *Ray.* 100. Or after error depending in parliament; for only the transcript of the record is removed. 1 *Sid.* 236.

But does not lie after *elegit* or *ea. fa. had.*

But it does not lie on a judgment after execution sued by *elegit*, or otherwise, for he has chosen another remedy. 1 *Roll.* 601. Nor after defendant taken on

on *ca. fa.* and discharged by plaintiff's consent,
4 *Burr.* 2482. *Vigers v. Aldrich.*

Debt lies upon every exprefs contract to pay a sum certain; as if a man covenants or grants to pay. 1 *Leo.* 208.

So though there be only an implied contract: as if a man be found in arrear upon account. 1 *Roll.* 598. l. 47.

So against a sheriff for money levied by him Against sheriff. upon a *feri facias*; for the law creates a contract for his paying; 1 *Roll.* 598. l. 10. though the writ be not returned. *Ibid.* l. 15.

Debt will lie on a foreign judgment, and the plaintiff need not shew the ground of the judgment. Foreign judgment. If he conclude *prout patet per recordum*, that is to be rejected as surplusage, and the defendant cannot plead *nul tiel record.* *Dougl.* 1. *Walker v. Whitter.* Wherever *indebitatus assumpsit* can be maintained, debt will lie. *Ibid.*

It lies for a penalty given by an act of parliament, for the penalty of a bye-law; though it is not said by what action it shall be recovered. Penalty by act of parliament or by law. 1 *Roll.* 599. l. 25. So for a *nomine pœnæ.* 1 *Lev.* 110. For a pain or amercement in the court baron. 2 *Saund.* 66. 1 *Lev.* 203. So for a fine upon an admittance to a copyhold. 1 *Sid.* 58. 2 *Mod.* 230. 3 *Mod.* 340. *Hard.* 487. So for fees given by a statute to a sheriff. *Mo.* 853. 1 *Salk.* 209.

But it does not lie on a bill of exchange against the acceptor. *Hard.* 485. Nor on a promissory note. But not on a bill of exchange or note. *Str.* 680.

In debt for goods sold and delivered, the plaintiff declared that the defendant at Westminster, in the county of Middlesex, was indebted to him in a certain sum for goods sold and delivered, without alledging an exprefs contract and place where such contract was made; upon special demurrer for these causes, the court held the contract and venue well laid. *Emery v. Fell, Trin.* 27 *Geo.* 3. *B. R.* For goods sold, how to declare.

It is determined that the plaintiff may recover a less sum than demanded, provided he remits on the roll the residue. May recover less than the demand. 1 *Lord Ray.* 816.

Court will not stay proceedings, paying the penalty.

In debt on bond with condition to account for money to be received, the court will not stay proceedings upon paying the penalty into court, because damages may be recovered beyond that amount, *Lord Lonsdale and others v. Church* K. B. E. 28

Penalty merely a security.

Geo. 3. The penalty is merely a security, and where it is not sufficient, the plaintiff may recover damages as well as the penalty. *Term Rep. 2. V. 389.* In *White v. Sealy*, *Doug. 47.* Mr. Justice Buller not satisfied with that determination. *Vide Show. P. C. 15.*

Affault.

Affault lies where there is an attempt or offer to beat another without touching him; as if one lifts up his cane or his fist in a threatening manner at another; or strikes at him, but misses him. *Finch, 202.* Battery is the unlawful beating of another. The least touching of another person wilfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner. *6 Mod. 173. 149. Vent. 256.*

If the plaintiff declares for an assault and battery, he may recover for his assault only, though the declaration cannot be singly for the assault. *Kitch. 38. a.*

Costs.

If the plaintiff recovers a less sum than 40s. there are no more costs than damages recovered. *22 & 23 Car. 2. f. 149.* unless the judge certifies the battery proved.

Imprisonment.

Affault and false imprisonment. This action lies for every confinement of the person without sufficient authority, and is commonly joined to an assault and battery; for every imprisonment includes a battery, and every battery an assault. *2 Inst. 598.* And to constitute the injury, there are two points requisite: 1. *The detention of the person;* and, 2. *The unlawfulness of such detention.* *Ibid. 46.*

Case.

Case. This action lies in a great variety of instances, viz. For affecting a man's reputation or good name, by malicious, scandalous, and slanderous

derous words, tending to his damage and derogation^a. On an *assumpsit* or undertaking, where, by ^a Hob. 138. any unwholesome practices of another, a man sustains any apparent damage in his vigour or constitution; as by selling him bad provisions or wines^b, by the ^b Roll. Abridg. exercise of a noisome trade which infects the air in ⁹⁵. his neighbourhood; or by the neglect or unskillful management of his physician, surgeon, or apothecary^c. For it hath been solemnly resolved that ^c 11 Hen. 6. 18. *mala praxis* is a great misdemeanor and offence at common law, whether it be for curiosity or by neglect; because it breaks the trust which the party had placed in his physician, and tends to the patient's destruction. Against carriers and others upon the custom of *England*^d; innkeeper for goods stolen ^d 10 Ann. c. 14. in his house while he is a guest^e. For deceits in ^e Moor. 117. contracts, bargains, and sales^f; for negligence; ^f Dany. 173. keeping a dog accustomed to bite sheep^g; taking ^g 1 Vent. 190. or enticing away my servant or apprentice, whereby I lose his service^h; disturbance in the use of a seat ^h 1 Cro. 177. in the churchⁱ; for injuries done in commons^k; ⁱ Moor. 907. for malicious prosecutions, conspiracy, escape, and ^k Style 168. rescous^l; for stopping up a water-course or way; ^l 1 Salk. 15. breaking down a party wall; stopping of ancient lights, and for any private nuisance to a man's walls, light, or air^m; against sheriffs for default in ^m 3 Inst. 231. executing writsⁿ; for disturbing a parson in taking ⁿ 9 Rep. 54. his tithes, &c. ¹ 1 Cro. 477. ² Cro. 478.

Trover is a special action on the case, which one ^{Trover.} man hath against another, who hath in his possession any of his goods by delivery, finding, or otherwise; and sells or makes use of them without his consent, or refuses to deliver them on demand; and it is to recover damages to the value of the goods. ² Lill. Abr. 618. It lies for goods tortiously seized by officers of the revenue. ³ Alk. 146.

In form it is a fiction: in substance, a remedy to recover the value of personal chattels *wrongfully* converted by another to his own use.

The form supposes the defendant *may* have come lawfully by the possession of the goods.

This action lies, and has been brought in many cases where, in truth, the defendant has got the possession lawfully.

If the defendant delivers the thing upon demand, no damages can be recovered in this action, for having taken it.

It is an action of *tort*: and the whole tort consists in the wrongful conversion.

Two things are necessary to be proved, to intitle the plaintiff to recover; first, *property* in the plaintiff; and, secondly, a wrongful *conversion* by the defendant.

Where the defendant takes the goods wrongfully and by trespass, the plaintiff, if he thinks fit to bring *this* action, waves the trespass, and admits the possession to have been lawfully gotten. *Cooper, and others, v. Chitty. 1 Burr. 30.*

May be brought
against a sheriff.

It is maintainable by the assignees against a sheriff who sells the goods of a bankrupt (before taken by him in execution) after assignment: for, after assignment, they become *the property of the assignees from the time of the bankruptcy, by relation. Ibid. 31, 32.*

It lies against the sheriff for this unlawful *conversion*, though this relation shall not make him a *trespasser* or *wrongdoer*, where the *original taking* of the goods was prior to the assignment, and lawful. *Ib. 35 to 38.*

Declaration.

The declaration ought to shew *the property* in the plaintiff, yet if it says that the plaintiff was *possessed*, omitting *ut de bonis suis propriis*, it is good. *Mo. 691. Hardr. 111.* If it says that the testator was possessed, and made the plaintiff executor; it is sufficient, without saying, *that he was possessed. Lat. 214. 2 Cro. 129.* So the declaration must *express the goods demanded with convenient certainty*; but it is sufficient if there be *certainty enough to describe the thing to common understanding. Sho. 144.* It ought to alledge a *conversion*, as also the *time and place of the conversion*: for it is traversable. *Cro. Eliz. 97, 8. 78. 1 Brownl. 8.* The defendant may plead not guilty or a release. Not guilty *infra sex annos. Lut. 99.* He cannot justify detaining goods till money laid out on them is paid. But it may be deducted in the damages. *Str. 657.*

Plea.

Detinue

Detinue lies for the recovery of goods *in specie*, *Detinue.* and also damages for the detainer; and it lies against a person who has them either by delivery or finding. But as the defendant in this action may wage his law, *trover* is the action in more common use.

It lies for money or goods so certainly described that they may be known: As for money in a chest or bag. 1 *Roll.* 606. l. 12. 14. For particular pieces of silver. *Ibid.* l. 25.

So for an obligation deed, &c. *Reg.* 159. b.

So for a note, bill, &c.

The declaration must contain more certainty than Declaration. is necessary in *trover*. 2 *Danv.* 520.

The plaintiff must prove an actual possession in Proof. the defendant and the detainer of the goods precisely as mentioned in the declaration: and therefore if *detinue* be brought for a bond, and it is proved to be for a greater or less sum, it is not sufficient. 2 *R. A.* 703.

Trespass lies for an injury done by one private *Trespass.* man to another; as entering on another man's ground without a lawful authority, and doing some damage however inconsiderable to his real property. For the right of *meum* and *tuum*, or property in lands, being once established, it follows as a necessary consequence that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil; and every entry therefore thereon, without the owner's leave, and especially if contrary to his express order, is a trespass or transgression. The party must have property in the soil, and actual possession by entry, to be able to maintain it; or, at least, it is requisite that the party have a lease and possession of the vesture and turbage of the land. *Moor.* 456. 1 *Inst.* 57. 2 *Roll. Abr.* 572. 2 *Lill. Abr.* 596. 2 *Roll. Abr.* 545.

The person in whom the general property in a Personal *pro* personal chattel is, may maintain an action of *tres-* *per-* *ty.* pass for the taking or injuring thereof by a stranger, although he has never been in the actual possession of it:
For

For a general property does always draw to it a possession in law; which possession is, in the case of a personal chattel, by reason of the transitoriness of its nature, sufficient to found an action of trespass upon. *Bro. Tresf.* 303. *pl.* 346. *Latch.* 214. 2 *Bulstr.* 268.

Real property.

Only the person who has the possession in fact of the real property to which an injury has been done, can maintain an action of trespass for the injury: Because the gift of an action of trespass, for an injury to either real or personal property, is the being disturbed in the possession of the property. And the having a general property, does not in the case of real property, as it does in the case of personal, draw to it a possession in fact. *Bro. Tr.* *pl.* 38. *pl.* 303. *pl.* 346. 3 *Lev.* 209. *Latch.* 263. 2 *Bulstr.* 268. And there must not only be a possession of real property, to which an injury has been done; but it must be a lawful one. For an intruder into land does not gain by the intrusion such a possession as will enable him to maintain an action for a trespass thereupon committed. 2 *Lev.* 147. *Plowd.* 546. 4 *Leon.* 184.

Every one of the parties to a trespass is liable to an action; for there can be no accessory to a trespass. 1 *Lev.* 124. *Bro.* title *Tresp.* 113.

An action it is said does not lie before a cause of action accrued; but if the cause of action *accrued before the bill filed* it is good, though the writ issued before. *Cowper's Rep.* 454. This was an action of trespass; and the lat. sued 22d *August* 1775; trespass proved 25th *Sept.* following. The court held, that the bill was the commencement of the suit, and the latitat was to be considered but as a process. The law does not allow one action upon *several* and *distinct* causes of action.

In personal actions, if two causes of action are of the same nature, they may be put in one action. *Tb. D. l. 8. c. 26. f. 1, 2.*

Whenever

Whenever the same process and judgment are in two counts they may be joined, otherwise they cannot. *2 Wils. 321.* Debt on a judgment and a *mutuatus* may be joined; so may debt on a *bond* and a *mutuatus*, although there be different pleas required, because there is the same process and judgment. *1 Wils. 248.* Debt and detinue may be joined. *Bro. pl. 97.* Debt upon an amercement and a *mutuatus* may be joined. *1 Wils. 248.* The duke of Bedford *v. Alcock.* Case for a misfeasance and negligence against a common carrier may be joined with trover. *Dickson v. Clifton, 2 Wils. 319.*

For whom and against whom an Action will lie.

AS the law grants redress for all injuries, and gives a remedy for every kind of right, so it is open to all kinds of persons, and none are excluded from bringing an action, except on account of their crimes, or their country; as men attainted of treason or felony, persons outlawed or excommunicated, convict in *præmunire*, alien enemies professed in orders of the papal religion, as friars, monks, &c. (unless they have attained a pardon), infants, *feme covert*s (unless by special custom), or persons not in *rerum natura*; but executors or persons outlawed have a right to sue in right of their testator or intestate. *1 Inst. 128.* In life, liberty, and estate, every one (who has not forfeited them) has a property and right; and if they are violated, the law gives an action to redress the wrong, and punish the wrong-doer. *Vaug. 337.*

But care must be taken how such actions are brought, as if an infant is plaintiff, he must sue by his next friend or guardian (*Roll. Abr. 287*), unless he sue with others as executor, and then he may sue by attorney, for all of them together represent the

When actions
may be joined.

Care must be
taken how
actions are
brought.

the testator. *Ibid.* 288. If an infant is sued, he must appear by a guardian; if not, the plaintiff may move the court to have one appointed. 2 *Inst.* 26. If an idiot sue or be sued, he must do it in per-

Married woman,

son. *Co. Lit.* 135. b. A married woman must sue with her husband, and in all cases where they are both sued (although the husband may answer alone), yet the wife shall never be forced to answer without her husband (except it be a sole merchant, *i. e.* when she carries on a sole and separate trade, which is by the custom of *London* only). 10 *Mod.* 6. 1 *Inst.* 135. Wherever the suit will survive to the wife she must join in the action. 1 *Wils.* 224. *Dunstan v. Burwell.* Or where the debt is due to the *feme dum sola*, both must join. *Moor*, 422. If baron is possessed of tithes in right of the *feme*, they must join in debt for not setting them forth, because the *feme* is the proprietor. *Cro. Eliz.* 608. 613. If the action is brought for the labour of the wife only, she may join in the action. 2 *Sid.* 128. *Cro. Jac.* 77. But declaration must state it to be done by the wife. 2 *Wils.* 424. *Cro. Jac.* 77. The dippers at Tunbridge Wellsall joined with their husbands, and held well. 2 *Wils.* 414. *Weller, & ux. and others, v. Baker.*

Executors,

Executors, when they bring an action, must all be named; but when an action is brought against them, it must be only against such of them as do administer. 1 *Roll. Abr.* 924. *Carth.* 124. If there are two executors, one under age, and the other proves the will, and hath administration *durante minore, &c.* he may sue solely. But where both are of full age, though the will be proved by one only, the action must be brought in both their names. 2 *Lev.* 240. *Colborne v. Wright.* 2 *Jon.* 119. *Raym.* 198.

Joint-tenants.

Tenants in common.

Also, if two men have lands and goods together in joint-tenancy, and be wronged in them, they must sue jointly. *Co. Lit.* 180. Tenants in common ought to join in actions personal, but not real; and in assize and slander of title, they ought to sever. Divers persons may have an action of trespass

trespass jointly for goods taken or the like; but of battery, or such personal trespass, the action ought to be single; if one trespass be done by divers, the plaintiff may make it joint, or several, as he pleases; and yet two that join in a trespass, do so make one trespasser, that one of them is answerable for the other; and if they be sued in one action, they may sever in pleas and issues, and a release to one is a Release. release to all. Also the jury must assess damages for all, but there shall be but one satisfaction; and where a joint action doth lie against several persons, and some of their names are known, and some are not, the action may be brought against them that are known by their particular names; and you may declare against them *simul cum aliis*, &c. 2 *Lill. Abr.* 469. *Comb.* 260.

Until the time of *Ed. 1.* the king might have ^{Who may be} been sued in all actions, as a common person. ^{sued.} 22 *Ed. 3. 3.* *Th. D. l. 4. c. 1. f. 3.* But now none can have an action against the king; but one shall be put to him to sue by petition. The queen may be sued without the king her husband in all actions, for she is a person sole by the common law. *Th. D. l. 4. c. 2. f. 2.* So the queen dowager without suing to her by petition. *Ibid. f. 3.* So the prince of Wales may be sued by writ. *Ibid. f. 4.* Every subject of the king, ecclesiastical or temporal, man or woman, villain or free. 2 *Inst.* 55. 6. Though he be deaf, dumb, or an idiot. *Th. D. l. 4. c. 2. f. 4.* Though he be *non compos mentis*, lunatic. *Ibid.* Though he be committed or attainted. *Ibid. Noy, 1.* But though a person attainted is liable ^{Persons at-} to civil suits, yet he ought not to be charged but by ^{taunted.} leave of the court, or of a judge at his chambers. *Foster, Cr. L. 61.* 1 *Wilson, 217.* Nor can he be charged with a civil action without leave, if he is in prison for a crime, as for felony, &c. without a judge's order; although he be not attainted. Though he be outlawed, excommunicated, or within age. 2 *Inst.* 56. So every body politic may be sued, or an alien born.

Within

Within what time Actions are to be brought.

Limitation of
suits.

THE limitation of suits is founded in public convenience; and attended with so much utility, that courts of equity adopt the statutes made for that purpose, as a positive rule; and apply it by the parity of reason, to cases not within it. 2 Burr. 961.

By the 32 H. 8. c. 2. "No person shall have
"a writ of right of the possession of his ancestor,
"but within *sixty years*, nor of his own, but within
"thirty years."

Claim.

And, N. B. a claim or entry, to prevent the statute, must be upon the land, unless there shall be some special reason to the contrary. Salk. 205. 2 Str. 1086.

Writs of forme-
don within 20
years.

By 21 Jac. 1. c. 16. "All writs of *formedon*
"shall be sued within *twenty years* next after the
"title or cause of action first descended or fallen,
"with a proviso that if the person entitled to such
"writ be at the time of the said right first de-
"scended or fallen, within twenty-one years, *feme*
"covert, non compos mentis, imprisoned, or beyond
"the seas, then such person and his heirs may, not-
"withstanding the said twenty years be expired,
"bring his action, or make his entry as he might
"have done before this act; so as such person or
"his heirs shall, within *ten years* next after his full
"age, discovery, &c. take benefit of, and sue
"forth the same; and at no time after the said *ten*
"years."

Ejectment.

An ejectment must be brought within 20 years. Sid. 432.

Penal statutes.

By 31 Eliz. c. 5. "All actions, &c. brought for
"any forfeitures on any penal statute made,
"whereby the forfeiture is limited to the queen,
"shall be brought within *two years*; and all ac-
"tions upon any penal statute, the benefit whereof
"is

" is limited to the king and to the prosecutor,
 " shall be brought within *one year*; and in default
 " of such pursuit, then to be brought for the queen
 " within *two years* after that *year* ended. And if
 " any suit shall be brought after the time in that
 " behalf before limited (except on the statute of
 " tillage), the same shall be void and of none
 " effect."

By 21 Jac. 1. c. 16. " Actions for words shall Words.
 " be commenced and sued within *two years* next
 " after the words spoken, &c."

N. B. This doth not extend to *scandalum magna-* Doth not extend
tum, nor to cases where the special damage is to scand. mag.
 the gift of the action; but where the words of
 themselves are actionable, special damage will not
 take them out of the statute. 1 Sid. 95. Saun-
 ders, 61.

§ 3. " All actions of trespasss, of assault, bat- Trespasss, assault,
 " tery, wounding, imprisonment, or any of them, &c.
 " shall be commenced within *four years* next after
 " the cause of such actions or suits."

If trespasss be brought for beating a servant, *per*
quod servitium amisit, this is not such an action as
 is within the statute, being founded on the special
 damage. Salk. 206.

" All actions of trespasss, *quare clausum fregit*, Trespasss quare
 " actions of trespasss, *detinue, trover*, and *replevin*, claus. freg.
 " for taking away of goods and chattels; actions
 " of account (other than such accounts as con-
 " cern the trade of merchandize between merchant
 " and merchant, their factors and servants); ac-
 " tions on the case (except slander); actions of
 " debt, grounded upon any lending or contract
 " without specialty, debt for arrearages of rent,
 " are to be brought within *six years* next after the
 " cause of action." *Ibid.*

§ 18. 19. Provision is made for feme coverts,
 persons that are *non compos*, imprisoned, or beyond
 sea, and infants.

" That if in any the said actions or suits, Limitation after
 " judgment be given for the plaintiff, and the judgment or out-
 " same lawry reversed.

"same be reversed by error, or a verdict pass
 "for the plaintiff; and upon matter alledged
 "in arrest of judgment, the judgment be given
 "against the plaintiff, that he take nothing by his
 "plaint, writ, or bill; or if any the said actions
 "shall be brought by original, and the defendant
 "therein be outlawed, and shall after reverse the
 "outlawry, that in all such cases the party
 "plaintiff, his heirs, executors, or administrators,
 "as the case shall require, may commence a new
 "action or suit, from time to time, within a year
 "after such judgment reversed, or such judgment
 "given against the plaintiff, or outlawry reversed,
 "and not after." *Ibid.* § 4.

What actions are
 not within the
 Statutes.

Debt on 2 *Edw.* 6. for tithes, on an award, for
 a fine of a copyholder, rent on an indeiture of
 lease, or for an escape, are not within the *Stat.*
 1 *Sid.* 305. 1 *Saund.* 33. 37. 1 *Lev.* 273.
 Nor can it be pleaded by any sheriff to an action
 brought against him for money levied on a *fieri fa-*
cias, because the action is founded in *maleficio*, as
 also upon the judgment on which the *fieri facias*
 issued, which is a matter of record. 1 *Mod.* 205.
 212. A charity is not barred by length of time,
 2 *Vern.* 399. A legacy is not within the statute,
 1 *Vern.* 256. nor a mortgage. 1 *Chan. Caf.* 102.

When the time
 begins to run.

If the plaintiff be in England at the time the
 cause of action accrues, the time of limitation be-
 gins to run, so that if he, or (if he dies abroad)
 his executor or administrator, do not sue within six
 years, they are barred by the statute. *Smith, Exec. v.*
Hill, Executor. 1 *Wils.* 135.

The statute ne-
 ver begins to run
 against a plain-
 tiff who is a fo-
 reigner, until he
 comes into this
 realm.

If the plaintiff is a foreigner and does not come
 to England in 50 years, he still hath six years after
 his coming into England, to bring his action; and
 if he never comes to England himself, he has always
 a right of action while he lives abroad, and so have
 his executors or administrators after his death. *Stri-*
thorst v. Groeme. 3 *Wils.* 145.

Actions on
 prom. notes.

By 3 & 4 *Ann. c.* 9. Actions on promissory notes
 shall be brought within the time appointed for actions
 upon

upon the case. And, by c. 16. all suits in the admiralty for seamen's wages shall be commenced within six years after the cause of action.

When an action is limited by a statute to be commenced within a certain time, a bill of Middlesex, or latitat, sued out within that time may be produced in evidence at the trial, to prove that the action was commenced in due time. But if the writ was not sued out till after the year, though by relation it would be within the time, the plaintiff ought to be nonsuited. *Bull. nisi prius*, 135. Commencement of the action.

Court resolved in future to limit their own discretion in granting applications for informations in the nature of a *quo warranto* to six years, beyond which time they would not under any circumstances suffer a party who had been so long in possession of his franchise to be disturbed. *The King v. Dickinson*. 4 Term Rep. 284.

Proceedings in this Court.

THERE are two ways to proceed in this court, the one by *special original*, the other by *bill*; if the debt is large, and the plaintiff has cause to think the defendant will bring a writ of error after judgment, the best method is to bring the action by *original writ*, which issues out of the court of Chancery, and is a mandatory letter from the king, under the great seal, and directed to the sheriff of the county wherein the injury is supposed to be, requiring him to command the defendant either to do justice to the complainant, or else to appear in court, and answer the accusation against him; whatever the sheriff does, he must certify to the court together with the writ itself. Original writ.

These writs are either *optional* or *peremptory*; or, in the language of the law, they are either a *præcipe* or *peremptory*. The *præcipe* is in the alternative, "commanding the defendant to do

D

"the

The use of the writ.

Si fecerit te securum.

Security.

“the thing required, or shew the reason why he hath not done it.” The use of this writ is where something certain is demanded by the plaintiff, which is in the power of the defendant himself to perform; as to restore the possession of land, to pay a certain liquidated debt, to perform a specific covenant, to render an account, and the like; in all which cases the *præcipe* is drawn up in the form of a command to do thus, or shew cause to the contrary; giving the defendant his choice to redress the injury, or stand the suit. The other is called a *si fecerit te securum*; from the words of the writ, which direct the sheriff “to cause the defendant to appear in court, without any option given to him, provided the plaintiff gives the sheriff security effectually to prosecute his claim.” This writ is in use, where nothing is specifically demanded, but only a satisfaction in general; to obtain which, and minister complete redress, the intervention of some judicature is necessary: such are writs of trespass, or on the case, wherein no debt or other specific thing is sued for in certain, but only damages to be assessed by a jury. For this end the defendant is immediately called to appear in court, provided the plaintiff gives good security of prosecuting his claim. Both writs are tested or witnessed in the king’s own name: “Witness our self at Westminster, or wherever the chancery may be held.”

The security here spoken of, to be given by the plaintiff, is common to both writs, though it gives denomination only to the latter. The whole of it is at present become a mere matter of form; and *John Doe* and *Richard Roe* are always returned as pledges for this purpose. The use of them was to answer for the plaintiff, who, in case he brought an action without cause, or failed in the prosecution of it when brought, was liable to an amercement from the crown, for raising a false accusation; and so the form of the judgment still is. *Finch.* 189. 252.

The

The day on which the defendant is ordered to appear in court, and in which the sheriff is to bring in the writ, is called the return of the writ; it being then returned by him to the King's Bench at Westminster, and made returnable in term, at the distance of at least fifteen days from the date or teste, that the defendant may have time to come up to Westminster, even from the most remote parts of the kingdom.

This writ cannot issue unless the cause of action amounts to ten pounds, or above, on pain of ten pounds, and the proceedings thereon to be void.

5 Geo. 2. c. 27. 21 Geo. 2. c. 3.

A bill, is a shewing in writing the cause of complaint by the plaintiff against the defendant, where in the party is supposed to have received some wrong, and it is the ground-work of the cause; it need not be filed in the office (unless the defendant have privilege, or be in actual custody of the marshal or sheriff); but if he be in actual custody, then it must be filed to warrant the declaration; which is no more than a copy of it, or defendant will be entitled to his discharge.

If the defendant is not in custody, the ordinary course of proceeding is by process, entitled a bill of Middlesex; being so called because the court now sits in that county.

The bill of Middlesex (which was formerly founded on a plaint of trespass *quare clausum fregit*, entered on the records of the court) is a kind of *capias* directed to the sheriff of that county, and commanding him to take the defendant, and have him before the king at Westminster, on a day prefixed, to answer to the plaintiff of a plea of trespass; for the accusation of trespass gives the court jurisdiction, whatever else may be the real cause of action. It must be personally served on the defendant if he can be found in that county; but if not, then there issues out a writ of *latitat* to the sheriff of another county (as *Oxon*), which recites the bill of Middlesex, and proceedings thereon, thus: "And

"that it is testified that the defendant," "latitat & discurrit," "lurks and wanders about in Oxfordshire; and therefore commands the sheriff to take him, and have his body in court on the day of the return." But if the defendant lives in any other county, the *latitat* is the first process which issues to take him, and may be sued out upon a supposed, and not an actual bill of *Middlesex* issued prior; a notice in writing being wrote at the bottom of such writ or process directed to the defendant to appear by his attorney in court, to defend the action, to which the defendant may appear or not; which is recorded. If he appears, he finds sureties for his future attendance and obedience; called *common bail*, being the same persons that are pledges for the plaintiff's prosecution, viz. *John Doe and Richard Roe*. If the defendant does not appear upon the return, or in eight days after, the plaintiff may enter an appearance for him, and proceed thereupon, as if the defendant had done it himself. 12 Geo. 1. c. 29. 21 Geo. 2. c. 23.

Appearance.

Plaintiff may appear in default.

If defendant be held to bail.

But if the defendant is held to bail, there must be added to these writs a clause of *ac-etiam* to the usual complaint of trespass; the bill of *Middlesex*, commanding the defendant to be brought in to answer the plaintiff in a plea of trespass, "And also to a bill to be exhibited against him for one hundred pounds debt, or upon promise, as the case is," the complaint of trespass giving cognizance to the court, and that of debt authorising the arrest. Stat. 13 Car. 2. stat. 2. c. 2.

When defendant is arrested.

When the defendant is regularly arrested, he must either go to prison for safe custody, or put in *special bail* to the sheriff, the intent of the arrest being only to compel an appearance in court at the return of the writ: that purpose is equally answered, whether the sheriff detains his person, or takes sufficient security for his appearance, called *bail*, and he is supposed to continue in the custody of the bail, instead of going to gaol.

Upon

Upon the return of the writ, or *within four days* Bail, after, the defendant must appear according to the exigency of the writ^a. This appearance is effected by putting in, and justifying bail, to the action. If this be not done, and the bail that were taken by the sheriff *below* are responsible persons, the plaintiff may take an assignment from the sheriff of the bail bond (under the *stat.* 4th and 5th *Ann. c.* 16), and bring an action thereupon against the sheriff's bail: But if the bail, so accepted by the sheriff, be insolvent persons, the plaintiff may proceed against the sheriff himself, by calling upon him first, to return the writ (if not already done), and afterwards to bring in the body of the defendant. And, if the sheriff does not then cause sufficient bail to be perfected, he will himself be responsible to the plaintiff, by an attachment, for not obeying the last rule.

^a In London and Middlesex, but if in any other county six days.

If the bail to the sheriff be insolvent.

The bail must be put in either in *open court*, or before one of the *judges thereof*, or else in the country before a commissioner appointed by the *stat.* 4 & 5 *W. & M. c.* 4. which must be transmitted to the court and filed. These bail, who must at least be *two in number*, if the action be *by bill*, must enter into a *recognizance* before such judge or commissioner to this effect, "that if the defendant be condemned in the action, he shall pay the costs and condemnation, or render himself a prisoner, to the custody of the marshal, or that they will do it for him;" which recognizance is transmitted to the court on a slip of parchment, entitled a *bail piece*: If by original the recognizance is in a certain sum, being double the debt sworn to; and, if required, the bail must justify themselves in court (or before the commissioner in the country, by affidavit), "by swearing themselves housekeepers, and each of them to be worth double the sum for which they are bail, after payment of all their debts."

When bail must be put in.

By bill.

If by original.

They may afterwards discharge themselves by surrendering the defendant into custody *within the time allowed by law.* *R. E. 5 Geo. 1.*

May discharge themselves.

D 3

When

Declaration.

When the defendant has filed *common bail*, or put in *special bail*, as the case requires, the next proceeding on the part of the plaintiff is, to *declare against him*, by delivering a declaration, which is the *complaint*, being an amplification or exposition of the original writ (if the plaintiff proceeds by original), upon which his action is founded.; but the declaration upon the bill is a mere copy of it: When the defendant is brought into court, if the action is by bill, the plaintiff may declare in whatever action, or charge him with whatever injury he thinks proper (unless he has held him to bail by a special *ac-stiam*, which the plaintiff is then bound to pursue); but care is to be taken how such declaration is framed, as the law requires it should contain four things, *viz. truth, certainty, order, and congruity*; and in personal actions, the *day, year, and place* ought to be expressed, but not in *real actions*.

Conclusion of declaration.

This declaration concludes with these words, "*and thereupon he brings his suit,*" &c. by which word *suit* was anciently understood the witnesses or followers of the plaintiff. For in former times the law would not put the defendant to the trouble of answering the charge, till the plaintiff had made out, at least a probable cause. *Braet. 400.* At the end of the declaration, if the suit be *by bill*, are added also the plaintiff's common pledges of prosecution, "*John Doe and Richard Roe,*" which are now mere names of form; though formerly they were of use to answer to the king for the amercia-ment of the plaintiff, in case he were nonsuited, barred of his action, or had a verdict and judgment against him. *3 Bulst. 275.*

When the plaintiff has stated his case in the declaration, it is incumbent on the defendant within a reasonable time to make his defence, and put in a plea, or else the plaintiff will at once recover judgment by default against him. *Vide R. Trin. 22 Geo. 3.*

Defence.

Defence is a general assertion that the plaintiff hath no good ground of action, which assertion is afterwards extended and maintained in his plea; but
before

before he puts in his plea, he may *crave oyer* of the bond or other *specialty* upon which the action is brought; that is, to hear it read to him, the generality of defendants in the times of ancient simplicity being supposed incapable to read it themselves, whereupon the whole is entered *verbatim* upon the record, and the defendant may take advantage of any condition, or other part of it, not stated in the plaintiff's declaration.

The defendant cannot now *crave oyer* of the original writ. *Boats v. Edwards. Dougl. Rep. 227.* Cannot have oyer of original. For it is not warranted by any rule or principle of justice, and it is incumbent on the court to make their proceedings as little dilatory, oppressive, and expensive, as possible. *Ibid.*

Pleas are of two sorts, *dilatory*, and *pleas to the action*. *Dilatory*, are such as tend merely to delay or put off the suit by questioning the propriety of the remedy, rather than by denying the injury. *Pleas to the action*, are such as dispute the very cause of suit. The former cannot be pleaded after a general imparlance, which is an acknowledgment of the propriety of the action, but the latter may.

They are either to the *jurisdiction of the court*, the *disability of the plaintiff*, or, *in abatement to the writ, or count*, as by *misnaming* the defendant, which is called a *misnomer*, or other want of form in any material respect; or it may be that the plaintiff is dead, or of a suit depending in another court for the same cause of action. Pleas in abatement.

The former were very often used without any foundation of truth, and calculated only for delay; therefore by 4 & 5 Ann. c. 16. affidavit must be made of the truth thereof.

If you plead to the jurisdiction, you only make half a defence, that is, "*defends the wrong and injury*," for if you say, "*when, &c.*" it gives a jurisdiction to the court, *Co. Lit. 127.* and conclude to the cognizance of the court, "*praying judgment whether the court will have further cognizance of the suit.* *Salk. 298. pl. 9.* Plea to the jurisdiction.

To the disability.

Pleas to the disability, conclude to the person "by praying judgment if the said plaintiff ought to be answered;" *Lut.* 44. 639; and pleas in abatement (when the suit is by original) conclude to the writ, or declaration, by praying "judgment of the writ or declaration, and that the same may be quashed," *cassetur*, made void or abated, 5 *Mod.* 132; but if the action be by bill, the plea must pray "judgment of the bill," and not of the declaration; the bill being here the original, and the declaration only a copy of the bill. These pleas are to be pleaded in four days, inclusive of both days, *Jennings v. Webb*, 1 *Term Rep.* 277. unless where defendant is intitled to an imparlance, or the declaration be delivered so late in the term that defendant is not bound to plead in that term, then within four days of the next term (inclusive of both days).

When these are allowed, the cause is either dismissed from that jurisdiction, or the plaintiff is stayed till his disability be removed; or he is obliged to sue out a new writ, by leave obtained from the court, or to amend his declaration. *Co. Entr.* 271. But when they are over-ruled on demurrer, there shall be a judgment of *respondeas ouster*, or that the defendant answer over. 2 *Wils.* 368. *Eichorn v. Le Maitre*, *Carth.* 447. 5 *Mod.* 399. *Ray.* 329. It is then incumbent on him to plead a plea to the action; that is, to answer the merits of the complaint, which is done by confessing or denying it.

On a plea of misnomer if issue be joined thereon, the judgment is peremptory.

But where the issue is joined on a plea of *misnomer* in the defendant's christian name, and issue be taken thereon, and a verdict be found for the plaintiff, the judgment is peremptory; and there is no difference whether the issue be joined in a plea in abatement, or in a plea in bar, for wherever a man pleads a fact that he knows to be false, and a verdict be against him, the judgment ought to be final, and every man must be presumed to know whether his plea be true or false, *Ibid.* *Bro. tit. Peremptory*, 906.

A con-

A confession of the whole complaint is not usual, Confession. for by that, the defendant ends the matter; to avoid which he may suffer judgment to go by default. But frequently he confesses one part of the complaint (by a *cognovit actionem* in respect thereof), and traverses, or denies the rest, in order to avoid the expence of carrying that part to a formal trial, which he has no ground to litigate. A species of Payment of money into court. this sort of confession is by payment of money into court; which is necessary upon pleading a tender, or by paying into the hands of the proper officer of the court as much as the defendant acknowledges to be due, together with the costs hitherto incurred, in order to prevent the expence of any farther proceedings; and if after the money paid, the plaintiff proceeds, it is at his own peril. He may also plead a set-off, whereby the defendant acknowledges the justness of the plaintiff's demand on the one hand, but on the other, sets up a demand of his own to counter-balance that of the plaintiff, either in the whole, or in part; but this must be where there are mutual debts between the parties. 2 Geo. 2. c. 22. 8 Geo. 2. c. 24.

Pleas that totally deny the cause of complaint, General plea. are either the *general issue*, or a *special plea in bar*.

The general issue, or general plea, is what traverses, thwarts, and denies the whole declaration; without offering any special matter to evade it, as in trespass, either *vi et armis*, or on the case for consequential damage, not guilty; in debt upon contract, *nil debet*, he owes nothing; in debt on bond, *non est factum*, it is not his deed; on an assumpsit, *non assumpsit*, he made no such promise; or in real actions, *nul tort*, no wrong done; *nul disseisin*, no disseisin; and in a writ of right the mise or issue is, *that the tenant has more right to hold, than the demandant has to demand*. These pleas are called the general issue, because, by importing an absolute and general denial of what is alledged in the declaration, they amount at once to an issue; by which is meant a fact affirmed on one side, and denied on the other.

Special

Special pleas in bar.

Special pleas in bar of the plaintiff's demand, are very various, according to the circumstances of the defendant's case; as, in real actions, a *general release*, or a *fine*, both of which may destroy and bar the plaintiff's title. Or in personal actions, an *accord*, *arbitration*, *conditions performed*, *nonage of the defendant*, or some other fact which precludes the plaintiff from his action. A *justification* is likewise a special plea in bar; as in actions of assault and battery, *son assault demesne*, that it was the plaintiff's own original assault; in trespass, that the defendant did the original thing complained of in right of some office which warranted him so to do; or in an action of slander, that the plaintiff is really as bad a man as the defendant said he was. The statute of limitations may also be pleaded in bar, for which, see the several statutes under title *Limitation of Actions*.

Qualifications of a plea.

The conditions and qualities of a plea are: 1. That it be single, and contain only one matter, for duplicity begets confusion. 2. That it be direct and positive, and not argumentative. 3. That it have convenient certainty of time, place, and persons. 4. That it answer the plaintiff's allegations in every material point. 5. That it be so pleaded as to be capable of trial. *Co. Lit.* 303, 304.

Cannot plead a special plea, which amounts to the general issue.

They are usually in the affirmative, sometimes in the negative, but always advance some new fact not mentioned in the declaration; and then they must be averred to be true in the common form, "*and this he is ready to verify*;" and it is a rule in pleading, that no man be allowed to plead specially such a plea as amounts only to the general issue, or a total denial of the charge; for pleas that amount to the general issue, are only facts on which the issue may be turned in evidence, and therefore are not issues of fact to be referred to the court, but matters of evidence to be determined by a jury, and consequently not good pleas; because they draw to the examination of the court what is proper to be determined by a jury; but when such plea is pleaded,

ed, it is a good cause of special demurrer, since the *stat. 27 Eliz. 10 Co. 95. a. Roll. Rep. 112. Cro. Car. 157.* being only matter of form. 3 *Mod.* 166.

When the plea of the defendant is put in or Replication, filed, if it does not amount to an issue or a total contradiction of the declaration, but only evades it, the plaintiff may plead again, and reply to the defendant's plea, which is called a replication: either traversing it, that is, totally denying it; as if on an action of debt upon bond the defendant pleads *solvit ad diem*, here the plaintiff in his replication may totally traverse this plea, by *denying that the defendant paid it*; or he may alledge new matter in contradiction to the defendant's plea; as when the defendant pleads *no award made*, the plaintiff may reply and set forth *an actual award*, and assign a breach: or the replication may confess and avoid the plea by some new matter or distinction, consistent with the plaintiff's former declaration.

To the replication the defendant rejoins, or puts Rejoinder. in an answer called a rejoinder. The plaintiff may answer the rejoinder by a surrejoinder, upon which the defendant may rebut; and the plaintiff may answer him by a surrebutter. The whole is denominated the pleading, in the several stages of which it must be carefully observed, not to depart or vary from the title or defence which the party has once insisted on. For this (which is called a departure in pleading) might occasion endless altercation. Therefore the replication must support the declaration, and the rejoinder the plea, without departing out of it; yet in many actions the plaintiff, who has alledged in his declaration a general wrong, Novel assign- may in his replication, after an evasive plea by the defendant, reduce that general wrong to a more peculiar certainty, by assigning the injury afresh, with all its specific circumstances, in such manner as clearly to ascertain and identify it, consistently with his general complaint, which is called *a new or novel assignment.* 1 *Inst.* 124.

**Averments on
an issue taken.**

In any stage of the pleadings, when either side advances or affirms any new matter, he usually avers it to be true, "*and in this he is ready to verify.*" On the other hand, when either side traverses or denies the fact pleaded by his antagonist, he usually tenders an issue, as it is called, the language of which is different according to the party by whom the issue is tendered; for if the traverse or denial comes from the defendant, the issue is tendered in this manner, "*and of this he puts himself upon the country,*" thereby submitting himself to the judgment of his peers; but if the traverse lies upon the plaintiff, he tenders the issue or prays the judgment of the peers against the defendant in another form; thus, "*and this he prays may be enquired of by the country;*" for when in the course of pleading they come to a point, which is affirmed on one side, and denied on the other, they are then said to be at issue, all their debates being at last contracted into a single point, which must now be determined either in favour of the plaintiff or of the defendant.

But if either side (as for instance the defendant) pleads a special negative plea, not traversing or denying any thing that was before alleged, but disclosing some new negative matter; as where the suit is on a bond, *conditioned to perform an award*, and the defendant pleads negatively, "*that no award was made,*" he tenders no issue upon this plea, because it does not appear whether the fact will be disputed, the plaintiff not having yet asserted the existence of any award; but when the plaintiff replies, and sets forth an *actual specific award*, if then the defendant traverses the replication, and denies the making of any such award, he then, and not before, tenders an issue to the plaintiff, which being the end of all the pleadings, is either matter of law or fact.

Demurrer.

An issue upon matter of law, is called a *demurrer*; *demoratur*, rests or abides; and it confesses the facts to be true, as stated by the opposite party; but denies, that by the law arising upon those facts
any

any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse; according to the party which first demurs upon the point in question. As if the matter of the plaintiff's complaint or declaration be insufficient in law, as by not assigning any sufficient trespass, then the defendant demurs to the declaration; if on the other hand the defendant's excuse or plea be invalid, as if he pleads that he committed the trespass by authority from a stranger, without setting out the stranger's right; here the plaintiff may demur in law to the plea, and so on in every other part of the proceedings, where either side perceives any material objection in point of law, upon which he may rest his case, and upon the parties joining in demurrer, the issue is then complete, and the proceedings being entered on record, the matter of law on which the demurrer is grounded, is upon solemn argument determined by the court, and not by any trial by jury; and judgment is thereupon accordingly given.

An issue of fact is where the fact only and not the law is disputed; and when he that denies or traverses the fact pleaded by his antagonist has tendered the issue thus, "*and this he prays may be inquired of by the country;*" or, "*and of this he puts himself upon the country,*" it may be immediately subjoined by the other party, "*and the said A. B. doth the like;*" which done, the issue is said to be joined, both parties having agreed to rest the fate of the cause upon the truth of the fact in question to the determination of a jury. Issue of fact.

During the whole of these proceedings from the time of the defendant's appearance in obedience to the king's writ, it is necessary that both the parties be continued in court from day to day, till the final determination of the suit. In the course of pleading, if either party neglects to put in his declaration, plea, replication, rejoinder, and the like, within the times allotted by the standing rules of the court, the plaintiff, if the omission be his, Continuances.

Non suit.

is said to be *non suit*, or, if the negligence be on the side of the defendant, judgment may be had against him, for such his default; and, after issue or demurrer joined, as well as some of the previous stages of proceeding, a day is continually given and entered upon the record, for the parties to appear from time to time, as the exigence of the case may require. The giving of this day is called *the continuance*, because thereby the proceedings are continued without interruption from one adjournment to another.

Puis darrien continuance, when to be pleaded.

It may sometimes happen, that after defendant has pleaded, nay, even after issue or demurrer joined, there may have arisen some new matter, which it is proper for the defendant to plead; as, that the plaintiff has given the defendant a release, and the like; here, if the defendant takes advantage of this new matter as early as he possibly can, *viz.* at the day given for his next appearance, he is permitted to plead it, and it is called a plea, *puis darrien continuance*, or since the last adjournment; for it would be unjust to exclude him from the benefit of this new defence, which it was not in his power to make when he pleaded the former: It is dangerous to rely on such a plea, without due consideration; for it confesses the matter which was before in dispute between the parties, *Cro. Eliz.* 49. and it is not allowed to be put in, if any *continuance* has intervened between the arising of this fresh matter, and the pleading of it: for then the defendant is guilty of neglect, or *laches*, and is supposed to rely on the merits of his former plea: also it is not allowed after a demurrer is determined, or verdict given; because then relief may be had in another way, namely, by writ of *audita querela*, which is in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. This writ is now almost rendered useless, since the courts have shewn so much indulgence in granting a summary relief upon motion. *Lord Raymond*, 439.

When not allowed to be pleaded.

Audita querela.

Issue

Issue was joined, *venire facias* was awarded, return-
able *quindecim Hil.* 27th January: after this last
continuance, the defendant, on the 30th of January, ^{Plea *puis darrein* cont. cannot be rejected if verified by an affida-}
pleaded generally, that *puis darrein continuance*, viz. ^{vic.}
on such a day, he became bankrupt, *hoc paratus est*
verificare, &c. and verified this plea by an affidavit.
Motion to set it aside as a dilatory plea, alledging it
to be discretionary in the court whether they would
receive it or not. C. J. said, "That such discretion
" was contrary to the genius of the common law of
" England, and would be more fit for an eastern mo-
" narchy than for this land of liberty; *nulli negabimus*,
" &c. *justitium*;" and there is no difference between
this plea and any other defence, but this, viz. that
the fact which warrants this plea first existed or
happened *since the last*, and *before the next* continu-
ance; it is a defence which the party could not pos-
sibly make when he first pleaded, and which he
is bound to make after the last continuance, and
before the next. It must be verified by affidavit;
for if it was not to be so, great delays would ensue
by pleas of this kind. *Paris v. Salkeld*, 2 Wils. 137.
1 Sir. 492. If such plea is bad it must be deter-
mined on demurrer. Rule discharged.

The plea in this case was held bad, because it did
not aver that the defendant *had conformed himself*,
&c. according to the several statutes concerning bank-
rupts. *Ibid.* 140. The justices may receive such
plea at *nisi prius*. 2 Roll. 630. l. 30.

When the parties are at issue as before-mentioned, *Venire*,
the court awards a writ of *venire facias* upon
the roll, commanding the sheriff "that he cause to
" come at Westminster, on such a day, twelve free
" and lawful men of the body of the county, by whom
" the truth of the matter may be better known, and who
" are neither of kin to the plaintiff or defendant, to re-
" cognize the truth of the issue between the parties."
The jury is not summoned upon this writ, and
therefore not appearing at the day, must unavoid-
ably make default, and a compulsive process is now
awarded against the jurors, called a *distringas*, "com- ^{Distringas,}
" manding

“ manding the sheriff to have the bodies of the jurors,
 “ or to distrain them by their lands and goods, that they
 “ may appear upon the day appointed, (*nisi prius*,) unless
 “ before that day, the chief justice shall come into London,
 “ Westminster, or where the venue is laid.”

This clause, of *nisi prius* was inserted by virtue of the statute of *Westminster*, 13 Ed. 1. c. 30. 42 Edw. 3. c. 11.

Nisi prius record.

The record is passed and left with the proper officer, viz. the marshal, who takes it to *Westminster*, or *London*, where it is to be tried, and the cause being previously entered, is called on in its course, and the record is then handed to the judge to peruse and observe the pleadings, and what issues the parties are to maintain and prove, while the jury is called and sworn: the case is opened on the part of the plaintiff and defendant by their counsel, and when the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence; they consider and return their verdict at the bar; which is recorded in court by the proper officer, and then they are discharged.

Postea.

If the issue be found either for the plaintiff or defendant, or specially; or if the plaintiff makes default, or is non-suit; it is entered on the record, and is called a *postea*, which being entered, judgment may be signed thereon, unless ordered by the court to the contrary, for the verdict may be suspended for certain causes by a motion for new trial, or arrested. 6 *Mod.* 22. *Salk.* 649. 1 *Burr.* 390.

Error.

But if the judgment cannot be arrested, or the party obtain a new trial, execution will follow; unless the party condemned thinks himself unjustly aggrieved by any of the proceedings; and then he has his remedy to reverse the same by bringing a writ

writ of error; but he that brings it must find substantial bail (to prosecute the same) after verdict *in* Bail. *all cases*, and must bring it in time so as to prevent the plaintiff's taking out execution after judgment signed. *Vide 3 Jac. 1. c. 8. 13 Car. 2. c. 2. 16 & 17 Car. 2. c. 8.*

The execution of the judgment is adapted to the Execution, nature of the action; therefore if the plaintiff recover in a *real* or *mixed* action, wherein the seisin of the land is awarded to him, the writ is an *habere facias seisinam*, or an *habere facias possessionem*. *Finch, 470. Co. Lit. 34.*

Executions in actions where money only is recovered, as a debt or damages (and not any specific chattel), are of five sorts; against the body of the defendant, called a *capias ad satisfaciendum*, or against his goods and chattels, called a *feri facias*; or against the goods and the profits of his lands, called a *levari facias*; or against the goods and the possession of his lands, called an *elegit*; or against all three, his body, lands, and goods, called an *extent* or *extendi facias*: but only one of these writs can be issued at one time. *2 Inst. 143. Co. Lit. 293. T. Raym. 346.*

When the plaintiff's demand is satisfied, either Satisfaction, by the voluntary payment of the defendant, or by compulsory process, or otherwise, the defendant may compel the plaintiff to enter satisfaction on the record, that the defendant may not be liable hereafter to be harassed a second time on the same account. *2 Lill. Abr. 495.*

Of the Judges and Officers of the Court.

IT is probable and almost certain, that in very early times, before our constitution arrived at its full perfection, our kings in person often heard and determined causes between party and party; Probable that our kings determined causes, who delegated their power to the judges.

E

but

but at present, by the long and uniform usage of many ages, they have delegated their whole judicial power to the judges of their several courts; which are the grand depository of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself cannot alter, but by act of parliament. 2 *Haw. Pl. of the Cr.* 2.

In this distinct and separate existence of the judicial power, in a peculiar body of men, nominated indeed, but not removeable at pleasure, by the crown, consists one main preservative of the public liberty, which cannot subsist long in any state, unless the administration of common justice be, in some degree, separated both from the legislative and also from the executive power: were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative: for which reason by the statute of 16 *Car.* 1. c. 10. which abolished the court of star-chamber, effectual care is taken to remove all judicial power out of the hands of the king's privy council, who, as then was evident from recent instances, might soon be inclined to pronounce that for law, which was most agreeable to the prince or his officers. Nothing therefore is more to be avoided, in a free constitution, than limiting the provinces of a judge and a minister of state.

As to the
judges.

As his majesty is, in the eye of the law, always present in all his courts, his judges are the mirror by which the king's image is reflected. It is the regal office, and not the royal person, that is always present in court, always ready to undertake prosecutions, or pronounce judgment, for the benefit

ness and protection of the subject. *Co. Lit.* 139.
Fortesc. c. 8.

It is of the greatest importance to the law of England, and to the subject, that the powers of the judge and jury are kept distinct; that the judge determines the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and destruction of the law of England, *per Hardwicke, C. J. Rep. temp. H.* 28.

By whom the law is to be determined.

The judges consist of the Lord Chief Justice, and three other judges; the former is created by writ, and the latter by letters patent; and by the *stat. 26 Edw. 3. c. 1.* they are to take no fee but of the king; their commissions, in early periods, were *durante bene placito*, afterwards *quamdiu bene se gesserint*, with a power to remove them on the address of both houses of parliament, but now they are to continue in their offices during their good behaviour, notwithstanding any demise of the crown (which was formerly held immediately to vacate their seats), and their full salaries are absolutely secure to them during the continuance of their commissions. *1 Geo. 3. c. 23.* This act was made at the earnest recommendation of the king himself from the throne, "declaring that he looked upon the independence and uprightness of the judges, as essential to the impartial administration of justice, as one of the best securities of the rights and liberties of his subjects, and as most conducive to the honor of the crown." *Com. Journ. 3 Mar. 1761.*

They are sovereign justices of oyer and terminer, gaol delivery, and of eyre, conservators of the peace, and sovereign coroners of the land. *4 Inst. 73. 9 Co. 118. b.*

The present Judges are,

Lloyd Lord Kenyon, 5500*l.* 9th June 1788.

Sir William Henry Ashburst, Knight, 22d June 1770,

Sir Francis Buller, Bart. 6th May 1778,

Sir Nash Grose, Knight, 9th February 1787,

2400*l.*

Officers of the Court.

The present Chief Justice on the 7th of June 1788, was created a peer of Great Britain, by the title of Lord Kenyon, baron of Gredington, in the county of Flint. On Monday the 9th he was called to the degree of a *serjeant at law*, and sworn into the office of *lord chief justice*, and on Wednesday the 11th took his seat upon the bench.

The motto on the ring, "*Quid leges sine moribus?*"

If an action be brought against a *judge of record* for an act done in his judicial capacity, he may plead that he did it as *judge of record*, and that will be a sufficient justification; and so may a *judge of a court* in a foreign country under the dominion of the crown. *Moslyn v. Fabrigas, Cowp. Rep. 172.*

Officers of the Crown Side are,

THE *king's coroner and attorney*, commonly called the clerk of the crown, or master of the crown office, who taxes costs, nominates all special juries on the crown side, takes recognizances, inquisitions upon the death of any prisoner dying in the King's Bench, &c. *James Templar, Esq.*

The *secondary*, who draws up the paper books and makes up an *estreat* of all fines, &c. forfeited to the crown, *Francis Barlow, Esq.*

The *clerk of the rules*, who draws up all the rules of the court, and attends the court to take minutes thereof, *Henry Dealtry, Esq.*

There are also two other officers, the *examiner* and *calendar keeper*, Robert Belt.

Clerks in court. F. Barlow, John Wace, R. Belt, G. Lepipre, J. F. Abbot, J. O. Jones, H. Dealtry, and H. Barlow, *Esqrs.*

On

On the Plea Side.

THE chief clerks, secondary or master, their deputy, marshal, clerk of the rules, clerk of the papers, clerk of the day rules, clerk of the dockets, clerk of the declarations, clerk of the bails, postea's, and estreats, signer of writs, signer of the bills for Middlesex, custos brevium, clerk of the upper treasury, clerk of the outer treasury, filacer, exigenter, and clerk of the outlawries, clerk of the errors, deputy marshal, marshal and associate to the chief justice, trainbearer, clerk of the nisi prius in London and Middlesex, clerks of the nisi prius to the different counties appointed by the custos brevium, crier at nisi prius in London and Middlesex, receiver general of the seal office; criers, ushers, and tipstaffs.

Chief clerks. Lord Viscount Stormont and John Way, Esq.

Secondary. Edward Benton, Esq.

Assistant. Robert Forster, Esq.

Marshall. William Jones, Esq.

Clerk of the rules. T. F. Abbott, Esq.

Clerk of the papers. Robert Austen, Esq. Mr. Radcliffe, Dep.

Clerk of the day rules. Mr. William Bryant.

Clerk of the dockets. John Stride, Dep.

Clerk of the declarations, Deputy, J. Madocks.

Clerk of the common bails, postea's, and estreats. Richard Walter, Esq.

Signer of the writs. Messrs. Provost and Webb.

Signer of the bills for Middlesex. Mr. Booth Brathwaite.

Custodes brevium. Sir David Lindsay, Bart. John Way, Esq.

Clerk of the upper treasury. Mr. Thomas White.

Clerk of the outer treasury. Mr. Edge.

Filacer, exigenter, and clerk of the outlawries. Thomas Patience Adams, Esq.

Clerk of the errors. Roger Kenyon, Esq.

Deputy Marshal. Mr. John Jorden.

Officers of the Court.

Marshal and associate to the chief justice. Roger Kenyon, Esq. Mr. Jones, Dep.

Trainbearer. John Abrams.

Clerk of nisi prius in London and Middlesex. T. Lowten, Esq.

Crier at nisi prius in London and Middlesex. Mr. Philip Parry.

Sealer of the writs. Duke of Grafton.

Dep. Mr. Samuel Rogers.

Clerk to the lord chief justice. Mr. T. Platt.

Criers and ushers. Mr. Lloyd, Mr. Player, Mr. Hewett, Mr. Nithercliff.

Tipstaff to lord chief justice. Mr. George Wilkinson,
To the other judges. T. Ridgway.

Attornies of the Court.

Definition.

AN attorney, *attornatus*, or *attornatus* in law, is an officer appointed by the court, to prosecute or defend actions brought against or prosecuted by their clients: and the word is compounded of the Latin word *ad*, to, and the French, *tourner*, to turn: "to turn a business over to another." The ancient Latin name, according to *Bracton*, is *responsalis*; and they answer to the *procurator*, or proctor of civilians and canonists.

Were made by letters patent.

Before the *Stat. of West. 2. c. 10.* all attornies were made by letters patent under the great seal, commanding the justices to admit the person to be attorney to such a one. *2 Inst. 249.* That statute gave all persons liberty of appearing by attorney without any letters patent, otherwise they were to appear each day in court in their proper person; in consequence of which, great numbers of attornies were admitted by the judges, whereby many unskillful ones practised, which occasioned many mischiefs: for restraining of which, it was enacted by *Stat. 4 H. 4. c. 18.* "That the judges should examine them, and at their discretion to put those who were virtuous and of good fame on the roll, and

Judges to examine them, &c.

"those on the contrary to strike out." And the Stat. 33 H. 6. c. 7. limited the number in *Norfolk* and *Suffolk*. The attornies of *B. R.* are of record as well as the attornies of *C. B.* 1 Roll. 3. and it is now the common course for the plaintiff or defendant to appear by attorney, *F. N. B.* 26. D. But where the party stands in contempt, the court will not admit him by attorney, but oblige him to appear in person. *Ibid.* 262. Outlawry is excepted by Stat. 4 & 5 W. & M. c. 18.

By 13 W. 3. c. 6. attornies are to take the oaths To take the to government, under penalties and disability to oaths. practise.

12 G. 1. c. 29. If any who hath been convicted If an attorney convicted of forgery, perjury, subornation of perjury, or common barratry, shall practise as an attorney or solicitor or agent in any suit or action brought practise, judge to transport. in any court of law or equity within *England*, the judge hath power to transport the offender for seven years, by such ways, and under such penalties, as felons.

No person after 1st December 1730, to act as an attorney, or sue out any writ, or commence, carry on or defend any action, &c. either before or after judgment, in the name of any other person in the king's bench, common pleas, or exchequer, dutchy of *Lancaster*, or in any of the courts of great sessions of *Wales*, or of the counties palatine, or in any other court of record in *England*, where attornies have been accustomedly admitted and sworn, unless such person shall take the oath appointed to be taken, and shall be admitted and inrolled before 1st Dec. 1730, in such of the said courts where he shall act as an attorney, or shall be sworn, admitted and inrolled in the said courts.

2 Geo. 2. c. 23. s. 1.

Any one or more of the judges of the said courts respectively, shall, before they admit such person to take the said oath, examine and inquire touching his fitness, &c. and if satisfied that he is qualified, then to administer the oath, and after such oath taken, cause

Any judge before admission to examine if he be qualified; if so, then to administer the oath &c.

Admission.

him to be admitted an attorney of such court respectively, and his name to be inrolled as an attorney without fee, except 1s. for the oath: The admission to be written on parchment, and signed by such judge or judges respectively, wherein the usual stamp shall be first impressed and delivered to the person admitted. *f. 3.* The stamp now is 8l. in the whole.

23 Geo 3. c. 58.

The like clause
respecting soli-
citors.

The like clause as the first respecting persons soliciting suits in the court of chancery, court of equity, in the exchequer chamber, court of the dutchy of *Lancaster* at *Westminster*, or courts of the counties palatine of *Chester*, *Lancaster*, or *Durham*, or in any inferior court of equity in *England*. *Seet. 4.*

Seet. 5. The master of the rolls, two of the masters in chancery, the barons of the court of exchequer, the chancellor of the dutchy of *Lancaster*, and the judges of the other courts of equity, or any one or more of them, shall examine before they admit the person to take the oath touching his fitness and capacity to act as a solicitor, &c. and if satisfied, to administer the oath, &c. and cause him to be admitted a solicitor, &c.

None to act un-
less bound by
contract for five
years to a sworn
attorney.

No person shall be admitted to act as an attorney, or sue out any process or defend any action in the name of any other person, in any of the courts of law aforesaid, unless such person shall have been bound by contract in writing to serve as a clerk for five years, to an attorney duly and legally sworn and admitted in some or one of the said courts, and such person during the said term of five years, shall have continued in such service; and also unless such person, after the expiration of the said five years, shall be examined, sworn and inrolled, as before required. *Seet. 6.*

Judge to exa-
mine.

The judges before they admit such person, are to enquire touching his fitness and capacity, and if satisfied, are to administer the oath, and cause him to be admitted and inrolled. *f. 7.*

Solicitors.

The like with respect to persons who are to be admitted solicitors in the courts of equity, *f. 8 & 9.*

An

An attorney admitted in any of the said courts of law, or as a solicitor in any of the said courts of chancery, with the consent of any attorney in any of the said other courts, such consent being in writing signed by such attorney, and in the name of such attorney, to sue out any writ, or commence, carry on, prosecute or defend any action, or proceeding in such court, notwithstanding such person is not sworn or admitted to be an attorney of such court. *Sec. 10.*

An attorney of this court may sue in any other, with consent of an attorney of that court.

No attorney shall have more than two clerks at one and the same time, who shall be bound by contract in writing to serve as clerks. *Sec. 15.*

Not to have more than two clerks.

The prothonotaries and the secondary of the king's bench, &c. to have three clerks at the same time, and no more; and such clerks having served *five years*, may be admitted the same as any other clerk. *Sec. 16.*

Secondary of K. B.

An attorney of this court may, by the clause of the statute, carry on proceedings in the court of great sessions of *Wales*, in the name of an attorney of that court, and declare for business and fees.

May carry on proceedings in Wales by consent.

If any sworn attorney of this court shall knowingly and willingly permit or suffer any other person to sue out any writ, or commence or defend any action in his name, not being a sworn attorney, or a sworn solicitor in chancery, &c. and shall be thereof convicted, he shall, from the time of such conviction, be disabled to practise, and his admittance to be void. *Sec. 17.*

Sworn attorneys permitting those that are not to issue out writs, disabled from practice.

The clerk of the warrants of the common pleas is without fee or reward to inroll the name of every person who shall be admitted an attorney, and the time when, in rolls or books, to which all persons shall have recourse without fee or reward. *Sec. 18.*

Attornies to be inrolled.

A sworn attorney of this court may be sworn, admitted, and inrolled, a solicitor in all or any of the courts of equity, without any fee for the oath or any stamp, if the master of the rolls, &c. shall, on examining him, be satisfied that such attorney is duly qualified to be so admitted. *Sec. 20.* A sworn solicitor

A sworn attorney may be admitted a solicitor.

solicitor in one court of equity may be admitted into any other court. *Señ. 21.*

Attorney, &c. in
their own name
suing out any
writ, &c. not in-
rolled, forfeit
50l.

Any person in his own name, or in the name of any other, suing out any writ, or commencing or defending any action, &c. in any of the courts of law or equity, mentioned in the said act, as attorney or solicitor, in expectation of any gain, fee, or reward, without being admitted, shall forfeit 50l. to the use of the person who shall prosecute, and be made incapable to maintain any action for any fee, reward, or disbursements, on account of prosecuting or defending such action, &c. *Señ. 24.*

Articles cancel-
led by order of
court.

Frazer, an attorney of this court, had taken for his artickled clerk, one *Smith*, a turnkey of the *King's Bench prison*, a full aged man, and who still continued to act as turnkey. It did not appear that any money was paid, or that the master fed, lodged, or entertained the clerk (though the articles covenanted that he should), nor did the clerk officiate for *Frazer*, but in matters relating to the prison. It appeared that *Frazer* had, since these articles (which were dated only two years ago, in 1755), become concerned in 63 causes, on behalf of the prisoners in the gaol. The court were all very clear that these articles were merely collusive, and contrived to secure the business arising from the prisoners, and ordered the articles to be cancelled. *Frazer's case.* 1 *Burr.* 291.

Quaker.

A quaker having served a clerkship for five years, as before mentioned, to an attorney or solicitor, may be admitted an attorney on his affirmation. 12 *Geo. 2. c. 13. s. 18.*

The oath.

I A. B. do swear that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability.

So help me God.

No attorney be-
ing a prisoner,
to commence or
prosecute any
action.

No attorney who shall be a prisoner in any gaol or prison, or within the limits, rules or liberties of any gaol or prison, shall, during his confinement, in his own name, or in the name of any other,

other, sue out any writ or process, or commence or prosecute any action or suit, and all proceedings in such action or suit shall be void and of no effect; and such attorney so commencing or prosecuting any action or suit as aforesaid, shall be struck off the roll, and be incapacitated from acting as an attorney for the future. And any attorney permitting or empowering any such attorney as aforesaid, to commence or prosecute any action or suit in his name, shall be struck off the roll, and be incapable from acting as an attorney for the future. *Stat.* 12 Geo. 2. c. 13. s. 9.

Any attorney permitting, &c,

This not to prevent any attorney confined as aforesaid, from carrying on or transacting any suit or suits commenced *before the confinement of such attorney.* *Sec. 14.*

Not to extend to suits before confinement.

After action commenced by an attorney he becomes a prisoner, then the bail bond is assigned, and he being still a prisoner commences an action on the bail bond; this has been held in *C. P.* to be a continuance of the original suit commenced before the attorney became a prisoner. *Wheetham v. Needham, Barnes 46.*

May commence an action on a bail bond.

It has also been held that the above act relates only to *prosecuting*, and not to the *defending of suits.* *Longman v. Rogers, Barnes 263.*

Relates to prosecuting.

Persons bound *clerks to attornies, or solicitors*, are to cause *affidavits* to be made and filed of the execution of the articles within *three months next after the date thereof*; and in every such affidavit shall be specified the *names of every such attorney and solicitor*, and of *every such person so bound*, and their places of abode respectively, together with the *day of the date of such articles*; and every such affidavit shall be *filed within the time aforesaid*, in the court where the attorney or solicitor to whom every such person respectively shall be bound as aforesaid, hath been inrolled as an attorney or solicitor with the proper officer; and none to be admitted before such affidavit be produced and read in court. 22 Geo. 2. c. 46. s. 3, 4.

Persons bound to serve as clerks to attornies to cause affidavit to be made within three months after execution of contract.

None to be admitted before such affidavit produced.

In

Who are to file
such affidavits.

Books to be
kept, &c.

No attorney to
take a clerk af-
ter discontinuing
business.

Clerk to be em-
ployed the whole
time.

If, before the
expiration of the
time, the at-
torney die, &c.
or the clerk be
discharged by,
&c.

and be bound to
serve for the re-
mainder of the
time;

such service to
be good, if affi-
davit be made
and filed, &c.

In this court the secondary or his clerk shall be the proper officer for filing such affidavits, *sect. 5*; and shall keep a book, wherein shall be entered *the substance of such affidavit, specifying the names and places of abode of every such attorney and clerk, and of the person making such affidavit, with the date of the contract, and the days of making and filing such affidavit*; and may take, at the time of filing such affidavit, 2s. 6d. for his trouble; which books may be searched gratis. *Sect. 6.*

No attorney shall have, take, or retain any clerk, who shall become bound by contract in writing aforesaid, after such attorney shall have discontinued or left off, or during such time as he shall not actually practise or carry on the business of an attorney. *Sect. 7.*

Every person who shall become bound, &c. shall, during the *whole time or term* of service, to be specified in such articles, *continue and be actually employed by such attorney or solicitor, or his or their agent or agents*, in the proper business, practice, or employment of an attorney or solicitor. *Sect. 8.*

Provided if any such attorney, to or with whom any such person shall be so bound, shall happen to die before the expiration of such term, or discontinue or leave off his practice, or if such contract shall, by mutual consent of the parties, be cancelled, or such clerk shall be legally discharged by rule of the court, before the expiration of such term; and the said clerk shall, in any of the said cases, be bound by another contract or contracts in writing to serve, and shall accordingly serve in manner before mentioned, as clerk to any other such practising attorney or attornies as aforesaid, during the residue of the said term of five years, then such service shall be deemed and taken to be as good, effectual, and available, as if such clerk had continued to serve as a clerk for the said term to the same person to whom he was originally bound, *so as affidavit*

affidavit be duly made and filed of the execution of such second contract or contracts, within the time and in like manner as is before directed, concerning such original contract. Sect. 9.

Every person who shall become bound as a clerk as aforesaid, shall, before he be admitted an attorney, cause an affidavit of himself, or such attorney to whom he was bound as aforesaid, to be duly made and filed with the officer before appointed, that he *both actually and really served and been employed by such practising attorney, to whom he was bound as aforesaid, or his agent, during the said whole term of five years.* *f. 10.*

N. B. The master is to take care that the stamp duties be paid, if in town *within three months*, if in the country, *within six months.*

If any sworn attorney shall act as agent for any person or persons not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be any ways made use of upon the account, or for the profit of any unqualified person or persons, or send any process to such unqualified person or persons, thereby to enable him or them to appear, act, or practise in any respect as an attorney or solicitor, knowing him not to be duly qualified as aforesaid, and complaint shall be made thereof in a summary way to the court from whence such process did issue, and proof made thereof upon oath to the satisfaction of the court, that such sworn attorney had offended therein as aforesaid, then every such attorney so offending shall be struck off the roll, and for ever after disabled from practising as an attorney or solicitor; and in that case, and upon such complaint and proof made as aforesaid, it shall be lawful for the said court to commit such unqualified person, so acting or practising as aforesaid, to the prison of the said court, for any time not exceeding one year. *f. 11.*

No person shall act as a solicitor, attorney, or agent, or sue out any process at any general or quarter sessions of the peace, either with respect to matters sessions.

Before admittance of an attorney, affidavit to be made and filed of actual service.

Attorney acting as agent, or permitting his name to be used, or sending any process to any unqualified person, thereby to enable him to appear and act as an attorney, to be struck off the roll,

None but attorneys admitted to practise at general or quarter sessions.

matters of a criminal or of a civil nature, unless such person shall have been heretofore admitted an attorney of one of the courts of record at *Westminster*, and duly inrolled pursuant to *Stat. 2 Geo. 2. c. 23.*; or be hereafter admitted an attorney, and inrolled as aforesaid, pursuant to this act, or such other law as shall be then in being; and unless such person shall continue so entered on the roll at the time of such his acting in the capacity aforesaid: but every person who shall so act, not being admitted and inrolled as aforesaid, shall be subject to a penalty of fifty pounds, to be recovered by action of debt, bill, &c. by any person who shall sue for the same, within twelve months after the offence committed, with treble costs of suit. And if any attorney shall permit any person, not being admitted and inrolled as aforesaid, to make use of his name in the courts of general or quarter sessions as aforesaid, such attorney shall be subject to the like penalty of fifty pounds, to be recovered as aforesaid. *Sect. 12.*

Persons exempt-

Provided that nothing herein contained shall extend to deprive the attornies of the dutchy of *Lancaster*, or of the courts of *great sessions* in *Wales*, or of the *counties palatine* of *Chester*, *Lancaster*, and *Durham*, from acting within their respective jurisdictions. *Sect. 13.*

Attorney not attending, to have no privilege.

An attorney that has not been attending his employment in this court by the space of *one year*, unless hindered by sickness, shall not be allowed his privilege of an attorney. *R. M. 1654. Sect. 1.*

Attornies dismissed.

Attornies dismissed by one court from their practice for misdemeanor, be not (after certificate) admitted to practise in another court, it being contrary to the intent of the law. *Ibid.*

When he is entitled to privilege.

It seems that if an attorney remains of record, he is still entitled to privilege, *Lutw. 1667.* although he does not alledge in his plea that he has any clients, or prosecutes, or defends any causes at the time of the action being brought against him. *Vide* the above rule.

No attorney to be lessee in an ejectment, nor bail for a defendant in this court. *R. Mich. 1654.*

No person, without rule of court, or order of a judge, and notice to the adverse party or his attorney, shall change or shift his attorney; and such attorney newly coming in, to take notice at his peril of the rules whereunto the former attorney was liable, had he continued. *Mich. 1654.*

Not to change attorney without leave of the court.

This court will not permit an attorney to be changed in a cause, and another attorney appointed in his stead, till his bill of fees and disbursements be settled and paid. *12 Mod. 440. 8 Mod. 306.*

Nor till the former bill be paid.

Where the attorney for the plaintiff or defendant dies, pending the suit, and the party whose attorney is dead, will not retain another attorney, the cause against him may proceed, and is not bound to hinder his client's cause. *Sty. Pract. Reg. 13.*

Where the attorney dies.

The authority of an attorney continues until judgment (where no order has been obtained to remove him) and for a year and a day afterwards to sue out execution, and for a longer time if the party continues in execution; but if not, the judgment is supposed to be satisfied; and to make it appear otherwise, the plaintiff must again come into court, which he either does by *scire facias*, or an action of debt on the judgment. *Comb. 40. Sty. 426.* And then a new authority is necessary. *Salk. 86.*

How long the authority continues.

An attorney is not compellable to appear for any one, unless he undertake so to do; if he undertake, and does not file the appearance, upon summons before a judge he shall be compelled, or by motion. *6 Mod. 86. Str. 693. 12 Mod. 255.* He is bound if for an infant. *Str. 114.*

Not compellable to appear, but if he undertakes must.

Friday next after the octave of the purification of the Blessed Virgin Mary, in the 8th year of king George the third. *H. T. 1768.*

Whereas the habitations of many attornies practising in this court, resident in and near the cities of London and Westminster, are often very difficult to be found, whereby it is impracticable to serve them with notices, summonses,

Rules respecting attornies entering their names in the book, and where notices, &c. are to be served.

matters of a criminal or of a civil nature, unless such person shall have been heretofore admitted an attorney of one of the courts of record at *Westminster*, and duly inrolled pursuant to *Stat. 2 Geo. 2. c. 23.*; or be hereafter admitted an attorney, and inrolled as aforesaid, pursuant to this act, or such other law as shall be then in being; and unless such person shall continue so entered on the roll at the time of such his acting in the capacity aforesaid: but every person who shall so act, not being admitted and inrolled as aforesaid, shall be subject to a penalty of fifty pounds, to be recovered by action of debt, bill, &c. by any person who shall sue for the same, within twelve months after the offence committed, with treble costs of suit. And if any attorney shall permit any person, not being admitted and inrolled as aforesaid, to make use of his name in the courts of general or quarter sessions as aforesaid, such attorney shall be subject to the like penalty of fifty pounds, to be recovered as aforesaid. *Seet. 12.*

Persons exempt-

Provided that nothing herein contained shall extend to deprive the attornies of the dutchy of *Lancaster*, or of the courts of *great sessions* in *Wales*, or of the *counties palatine* of *Chester*, *Lancaster*, and *Durham*, from acting within their respective jurisdictions. *Seet. 13.*

Attorney not attending, to have no privilege.

An attorney that has not been attending his employment in this court by the space of *one year*, unless hindered by sickness, shall not be allowed his privilege of an attorney. *R. M. 1654. Seet. 1.*

Attornies dismissed.

Attornies dismissed by one court from their practice for misdemeanor, be not (after certificate) admitted to practise in another court, it being contrary to the intent of the law. *Ibid.*

When he is entitled to privilege.

It seems that if an attorney remains of record, he is still entitled to privilege, *Lutw. 1667.* although he does not alledge in his plea that he has any clients, or prosecutes or defends any causes at the time of the action being brought against him. *Vide* the above rule.

Attornies.

No attorney to be lessee in an ejectment, nor bail for a defendant in this court. *R. Mich. 1654.*

No person, without rule of court, or order of a judge, and notice to the adverse party or his attorney, shall change or shift his attorney; and such attorney newly coming in, to take notice at his peril of the rules whereunto the former attorney was liable, had he continued. *Mich. 1654.*

Not to change attorney without leave of the court.

This court will not permit an attorney to be changed in a cause, and another attorney appointed in his stead, till his bill of fees and disbursements be settled and paid. *12 Mod. 440. 8 Mod. 306.*

Nor till the former bill be paid.

Where the attorney for the plaintiff or defendant dies, pending the suit, and the party whose attorney is dead, will not retain another attorney, the cause against him may proceed, and is not bound to hinder his client's cause. *Sty. Pract. Reg. 13.*

Where the attorney dies.

The authority of an attorney continues until judgment (where no order has been obtained to remove him) and for a year and a day afterwards to sue out execution, and for a longer time if the party continues in execution; but if not, the judgment is supposed to be satisfied; and to make it appear otherwise, the plaintiff must again come into court, which he either does by *scire facias*, or an action of debt on the judgment. *Comb. 40. Sty. 426.* And then a new authority is necessary. *Salk. 86.*

How long the authority continues.

An attorney is not compellable to appear for any one, unless he undertake so to do; if he undertake, and does not file the appearance, upon summons before a judge he shall be compelled, or by motion. *6 Mod. 86. Str. 693. 12 Mod. 255.* He is bound if for an infant. *Str. 114.*

Not compellable to appear, but if he undertakes must.

Friday next after the octave of the purification of the Blessed Virgin Mary, in the 8th year of king George the third. *H. T. 1763.*

Whereas the habitations of many attorneys practising in this court, resident in and near the cities of London and Westminster, are often very difficult to be found, whereby it is impracticable to serve them with notices, *Rules respecting attorneys entering their names in the book, and where notices, &c. are to be served,*

summonses,

Attornies.

Summonses, orders, and rules, to the great delay of the proceedings in this court: For remedy whereof for the future, It is ordered, That the master shall forthwith cause to be prepared a proper alphabetical book for the purposes after mentioned, and that the same shall be publicly kept at the master's office in the King's Bench Walks, there to be inspected by any attorney, or his clerk, without fee or reward. And that every attorney practising in this court, and residing in London or Westminster, or within ten miles of the same, shall, before the first day of the next term, enter in such book (in alphabetical order) his name and place of abode, or some other proper place within the cities of London or Westminster, where he may be served with such notices, summonses, orders, and rules. And every attorney afterwards to be admitted, and practising and residing, as aforesaid, shall upon his admission make the like entry; and as often as any such attorney shall change his place of abode, or the place where he may be so served with notices, summonses, orders, and rules, he shall make the like entry thereof in the said book. And that all notices, summonses, orders, and rules, which do not require a personal service, shall be deemed sufficiently served on such attorney, if a copy thereof shall be left at the place lastly entered in such book, with any person resident at, or belonging to such place. And if any such attorney shall neglect to make such entry, that then the fixing up of any notice, or the copy of any summons, order, or rule, for such attorney in the said master's office, shall be deemed a sufficient service, unless the matter shall be such as requires a personal service. And it is further ordered, that a copy of this rule shall be publicly fixed up in the said master's office, and that another copy thereof shall also be fixed up in the chambers of each of the judges of this court.

N. B. It is expected that such practisers who live remote from the Temple, shall add to the place of their abode, where, and with whom, notices, summonses,

monses, orders, rules, and other proceedings that do not require personal service, may be left near any of the Inns of Court, or Chancery.

As many attornies have no certain place of residence, any place, where he may be served, though not in his actual place of abode, is sufficient. But when the name and place of abode is entered, then service at that place is the proper service. *Loft. Rep.* 357.

By Stat. 25 Geo. 3. c. 80. after the first of November 1785, there shall be raised and levied the rates and duties following: That every solicitor, attorney, notary, proctor, agent, or procurator, admitted, inrolled, or registered in any of his majesty's courts at *Westminster*, or in any ecclesiastical court, or in any of the courts of admiralty or cinque ports, or in any of his majesty's courts in *Scotland*, the great sessions in *Wales*, or in any courts in the counties palatine, or in any other court in *Great Britain*, holding pleas, where the debt or damage shall amount to 40s. or more, shall, previous to his commencing or defending any suit or prosecution, take out annually a certificate of such his admission, inrolment, or register: That for and upon every such certificate so taken out by any solicitor, &c. who shall reside in any of the Inns of Court, or in the cities of *London* or *Westminster*, the borough of *Southwark*, the parish of *Saint Pancras*, and *Saint Mary le Bone*, or within the bills of mortality, or within the city of *Edinburgh*, there shall be charged a stamp duty of 5l. and in any other part of *Great Britain*, 3l.

Certificates to be taken out annually by every solicitor practising in any court, holding plea, for 40s. and upwards

Those residing in *London* and *Westminster*, the bills of mortality, or *Edinburgh*, to pay 5l. for a certificate:

any other part, 3l.

From Nov. 1785, every acting solicitor &c. shall annually deliver in a note of his name and residence, &c. in order to obtain a certificate.

After the first of November 1785, every person admitted, sworn, inrolled, or registered a solicitor, attorney, &c. in any one or more of the courts aforesaid, who shall commence, carry on, or defend any action, suit, or prosecution therein, shall annually, during such time as he shall continue so to practise therein, deliver in to some one of the courts in which he shall have been admitted, sworn, inrolled, or registered, in such manner as is herein-after directed, a paper or note, in the proper hand-writing

F

ing

ing of every such solicitor, &c. containing his name and usual place of residence, and marked and stamped with the proper mark or stamp, denoting the duty herein before imposed upon certificates, according to the place of such his residence as aforesaid; and thereupon every such solicitor, &c. shall be intitled to have a certificate (if the same shall be required) in the manner herein after directed. *§. 3.*

Officers for entering applications for certificates in *England*.

The chief clerk of the king's bench, or his deputy, the clerk of the warrants in the court of common pleas, or his deputy, the clerk of the pleas in the exchequer office of pleas, or his deputy, the prothonotaries of the respective counties palatine of *Lancaster*, *Chester*, and *Durham*, and of the great sessions in *Wales*, or their respective deputies, and such officers of the inferior courts of law as the judge or judges of the inferior courts respectively shall appoint, the senior clerk of the petty bag office in the court of chancery, or his deputy, the king's remembrancer of the court of exchequer, or his deputy, the chief clerk of the dutchy chamber of *Lancaster*, or his deputy, the register of the respective courts of equity in the said counties palatine, and of the great sessions in *Wales*, or his deputies, shall, and they are hereby required, from time to time, upon payment of 1s. to enter the name and place of residence of such attorney, &c. and who shall have delivered in such paper or note in writing, duly stamped, and required a certificate of his inrolment as expressed, in rolls or books to be provided and kept for that purpose in the said several and respective offices: and such officers shall subscribe to every such paper or note in writing, so delivered in, a certificate signed by every such officer respectively, according to the form of the schedule annexed; to all which said rolls or books, in the said courts respectively, all persons shall and may, at all seasonable times, have free access, without fee or reward. *§. 4.*

Entering officers to certify notes delivered.

Every

Every certificate shall bear date on the day on which the same was issued, and shall endure and remain in force for the space of twelve calendar months, to commence from the first of *November* 1785, upon all certificates to be issued on or before that day, and upon certificates to be first issued to any person or persons, after the said first day of *November* 1785, to commence from the date of every such certificate; which said certificate shall be renewed at least ten days previous to the expiration of the time for which it was granted, and so yearly and every year, so long as such solicitor, &c. shall continue to practise in any such court in manner as aforesaid. *§. 5.*

Entering officers, &c. to issue annual certificates, which must be renewed ten days before expiration.

Persons residing in any of the *Inns of Court*, or in the cities of *London* or *Westminster*, or the borough of *Southwark*, the parish of *Saint Pancras*, or *Saint Mary le Bone*, or within the bills of mortality, or within the city of *Edinburgh*, for the space of *forty* days, or more, in any one year, every such solicitor, &c. shall be deemed to be resident within the limits of the different districts, and shall be liable to the higher duties imposed on certificates, notwithstanding such solicitor, &c. shall or may at other times in each such year, reside elsewhere without the limits last mentioned. *§. 6.*

Persons residing forty days in a year within the limits of the higher duties, are to pay the same.

Penalty of 50*l.* on every person who shall, in his own name, or in the name of any other person, sue out any writ or process, or commence, prosecute, carry on, or defend any action or suit, or any proceedings as a solicitor, &c. in any of the courts aforesaid, for or in respect of any gain, fee, or reward, without having obtained such certificate, or shall deliver in to the respective officers appointed any false or fictitious place of residence, with intent to evade the payment of the higher duties; and made incapable to maintain or prosecute any action in any court of law or equity, for the recovery of any fee, reward, or disbursements, on account of prosecuting, carrying on, or defending any such action, suit, or proceeding. *§. 7.*

Penalty on acting without certificate, or giving in a false place of residence.

Persons having taken out certificates may act for others who have also taken them out.

Any person having duly obtained a certificate, may sue or defend any action in the name and by consent of any other solicitor, &c. of such court in writing first had and obtained, and signed by him in like manner as he might have lawfully done before this act, provided such solicitor, &c. in whose name such proceedings shall be instituted, commenced, or carried on, shall also have first duly obtained a certificate out of the court wherein he is sworn, &c. in manner as herein before is directed; or in default thereof, every such solicitor, &c. shall be liable to the like penalties, &c. as any other solicitor is by this act made subject and liable to. *f. 8.*

Person under one certificate may act in any other court in which he is sworn, &c.

It shall and may be lawful for any person duly sworn, admitted, &c. a solicitor, &c. in any two or more of the said courts respectively, under a proper certificate obtained from either of the said courts respectively, to commence or defend any action or suit in any of the said other courts in which he is so sworn, &c. although such certificate shall or may not have issued from such other court. *f. 9.*

Where country attornies are concerned, pleadings to be delivered to the agents.

Where country attornies are concerned, declarations, pleas, and other proceedings, should not be delivered and carried on in the country, but by the agents in town.

Time to plead.

If the agent of the plaintiff's attorney gives the agent for the defendant time to plead, the country attorney cannot sign judgment till that time be expired.

Notice of trial.

Notice of trial must be given in town; but a countermand may be given in the country.

No under-sheriff or clerk, &c.

" That no sheriff, sheriff's clerk, receiver, nor sheriff's bailiff, be attorney in the king's courts, during the time that he is in office with any such sheriff." *Stat. 1 H. 5. c. 4.*

Attornies liable to be punished in a summary way.

Attornies are liable to be punished in a summary way, either by attachment, or having their names struck out of the roll for ill-practice, attended with fraud and corruption, and committed against the obvious rules of justice and common honesty; but the court will not easily be prevailed on to proceed in this

this manner, if it appears, that the matter complained of was rather owing to neglect or accident, than design; or if the party injured has other remedy by act of parliament, or action at law.

12 *Mod.* 251. 318. 440. 583. 657. 4 *Mod.* 367.

They are also liable to be punished for base and unfair dealings towards their clients in the way of business, as for protracting suits by little shifts and devices, and putting the parties to unnecessary expence, in order to raise their bills; or demanding fees for business that was never done; or for refusing to deliver up their clients writings with which they had been intrusted in the way of business; or money which has been recovered and received by them to their clients use, and for other such like gross and palpable abuse. .2 *Haw. Pl. of the Cr.*

144. 8 *Mod.* 306. 12 *Mod.* 516.

An attorney's name to the process being set thereto without his authority, proceedings were set aside. Name set without authority.

Oppenheim, qui tam, v. Harrison. 1 *Burr.* 20.

An attorney cannot be bail. *Dougl.* 466. Nor his clerk, 467. But in a criminal case, attorney for defendant may. *Rex v. Bowes, ibid.* Cannot be bail except in criminal case.

An attorney cannot be lessee in rejeement. *Dougl.* 466. Cannot be lessee,

An attorney is not compellable to serve as constable. *Dougl.* 538. Constable.

Payment to the attorney, is payment to the principal. *Dougl.* 623. 1 *Black. Rep.* 8. *Powel v. Little.* Payment.

Payment of the debt to an agent employed to sue the defendant by the plaintiff's attorney, is not payment to the plaintiff, though payment to the attorney himself is. *Yates v. Freckleson.* *Dougl.* 623. Payment to an agent.

An action lies against an attorney for neglecting to charge a person in execution at his client's suit, according to a rule of court; although it seems it was rather want of judgment than negligence, 3 *Wils.* 325; but the court will not proceed against him for it in a summary way. 4 *Burr.* 2060. An action lies for not charging in execution,

May detain writings, &c. until paid.

When may detain.

When an attorney may be arrested.

An attorney has a lien on the money recovered for his bill of costs.

If notice is given not to pay the costs to the client, &c.

Attorney ordered to pay costs.

An attorney or solicitor, having fees due to him, may detain writings until his just fees are paid; but if there are none due to him, the court, on motion, will compel the delivery of them, 1 *Lill.* 148.; but he cannot detain writings, which are delivered upon special trust, for the money due to him in that very business. *Mod. Caf. L. and Eq.* 306.

If a man hath a joint cause of action against two, one an attorney, and the other not, he must arrest both, and declare against them as in custody of the marshal. 2 *Salk.* 544. 2 *Lev.* 129.

An attorney has a lien on the money recovered by his client, for his bill of costs: if the money come to his hands, he may retain to the amount of his bill. He may stop it *in transitu*, if he can lay hold of it; if he apply to the court, they will prevent its being paid over till his demand is satisfied. If the attorney gave notice to the defendant not to pay till his bill be discharged, a payment by the defendant, after such notice, would be in his own wrong, and like paying a debt which has been assigned after notice. *Dougl. Welsh v. Hole*, 238.

A verdict was given for 20l. and error brought; the plaintiff compromised with defendant for ten guineas for the debt and costs (after he had been in gaol for two years); a motion was made for a rule to shew cause why the defendant should not pay the plaintiff's attorney's bill; but it was discharged, because the application went to the extent of contraverting the validity of a payment of the whole debt and costs to a plaintiff without the privity of his attorney; and it would be too much to say, that a defendant shall not transact the business of a cause with the plaintiff himself, in a case where there has been no notice not to do so from the attorney, either express or implied. *Dougl. Rep. Welsh v. Hole*, 238.

An attorney was ordered to pay costs (as well as his client), having joined in an affidavit to support a frivolous complaint, and made resentful declarations which shewed him to be personally active in it. 2 *Burr.* 654. *Rex v. Fielding, Esq.*

If an attorney has been struck off the roll (though at his own request) and called to the bar, the court will not permit him to be put on again; at least not unless he has been disbarred upon application for that purpose to the inn of court where he was called: *Ex parte Cole, Dougl. 144.*

The court will lay an attorney who has been struck off the roll at his own instance, and applies to be restored, under the terms of taking no advantage of his privilege in any action then depending. *Dougl. 114.*

An attorney was fined 500*l.* for taking 200*l.* of a person charged with forgery, to let him out of custody of the tipstaff. *Rex v. Vaughan. 1 Wils. 22.*

An attorney of this court was arrested by a latitat, and was held that it is a motion of court to discharge him out of custody on filing common bail. *Wheel-er's case. 1 Wils. 298.*

But if an attorney of the C. B. is arrested by latitat, he must plead his privilege. *Snee v. Humphrys, one, &c. 1 Wils. 306.*

An attorney convicted of felony was struck off the roll as being an unfit person to practise. *Cow. Rep. 829.* The conviction was five years preceding the application, and no misconduct imputed to him.

The court, under circumstances, will entertain a summary jurisdiction over an attorney in obliging him to deliver up deeds, &c. on satisfaction of his lien, though they came into his hands as steward of a court and receiver of rents. *Hughes v. Mayor, 3 Term. Rep. 275.*

They are to be governed by the master, and to attend him on notice; *R. Hil. 15 Car. 2.* may file bills and declarations, paying two shillings a term, and examine the files gratis. *Mich. 15 Car. 2. reg. 3.*

Not bound to discover and give in evidence the contents of a deed shewn by his client, nor any instructions given him by his client, nor can he be forced to act against his will.

But he is not privileged from giving evidence of collateral facts. *Cowp. Rep. 846. Doe v. Andrews.*

drews. As witness to an agreement obliged to prove his client having sworn and signed an answer, upon which the latter is indicted for perjury. *Ibid.*

Trinity Term, 31 Geo. 3.

New rule respecting clerks, and their future admission.

It is ordered, that from and after the last day of Michaelmas term next ensuing, no attorney who shall be retained or employed as a writer or clerk by any other attorney shall, during the time of such employ, take or have any clerk under articles; and that no service to any such attorneys under articles, during the time that such attorney shall be so employed by any other attorney, shall be deemed good service: *and it is further ordered*, that from and after the same last day of Michaelmas term, no person who shall enter into articles with an attorney or attorneys shall be at liberty to serve the agent or agents of such attorney or attorneys under such articles for a longer time than any one year of his clerkship; and that any such service to an agent or agents *beyond* that time, shall not be deemed good service. And to the intent that better information may be obtained touching the fitness and qualifications of persons applying to be admitted attorneys, *it is further ordered*, that, from and after the same last day of Michaelmas term, every person who shall intend to apply for admission as an attorney in this court, and who shall not have been admitted an attorney or solicitor of any other court, shall for the space of *one full term*, previous to the term in which such person shall apply to be admitted, cause his name and place of abode, and also the name or names, and place or places of abode, of the attorney or attorneys to whom he shall have been articulated, written in legible characters, to be affixed on the out side of the court of king's bench, in such places as publick notices are usually affixed; and also in some conspicuous place in the chambers of each of the judges of this court, and in the king's bench office: and that no person who shall not have regularly complied with this order, shall in future be admitted an attorney of this court.

By the Court.

How

How to proceed to file the Articles and get admitted.

The first of the affidavits is to be filed with the master *within three months*; and, if neglected, there generally is an indemnity bill passes every year, so as to give the clerk an opportunity of filing the same afterwards with the master of the king's bench. Pay 2s. 6d.

Before the clerk obtains his fiat for admission, he gets his affidavit delivered back again by the master's clerk: pay him 2s. 6d. Take it with the affidavit of *service of clerkship*, to one of the judge's clerks, who will introduce you to the judge; and, on examination, the judge will grant his fiat for the admission: pay 10s. 6d. then take same to the master in court, who will swear you in: pay the criers 2s. 6d. get it back, and carry it to his clerk, who will make out the admission: pay him 8l. 2s. and sign the roll; pay 1s. call for the admission afterwards.

But for clerks admitted after Michaelmas term next, you must adhere to the new rule previous to the admission; and I suppose there will be a new form of affidavit of service requisite.

W. T. of the Inner Temple, London, gentleman, Affidavit of due
maketh oath and saith, That by articles of agree- execution of
ment, bearing date the day of last articles,
past, made between *J. L. of the Inner Temple,*
London, gentleman, one of the attornies of the court
of *King's Bench*, of the first part, *L. M. of*
in the county of Middlesex, of the second part, and
A. M. of the same place, widow, of the third part,
the said *L. M.* for the consideration therein men-
tioned, did put out, bind out, and place himself to
be a clerk to the said *J. L.* and with him, after the
manner of a clerk, to serve from the day of the
date of the said articles, for the full term and time
of five years from thence next ensuing, and fully to
be complete and ended, in the profession and prac-
tice of an attorney and solicitor, and which said ar-
ticles

ticles were in due form of law executed by the said *J. L. L. M.* and *A. M.* in the presence of this deponent, and *J. B.* of in the county of gentleman, and that the names *W. T.* and *J. B.* set and subscribed as witnesses to the due execution thereof, are of the proper hand-writing of this deponent and the said *J. B.*

Affidavit of the
service of articles
of clerkship.

A. B. of, &c. gent. maketh oath and saith, That he has duly and faithfully served the within-named *C. D.* for the full term of five years, according to the true intent and meaning of the articles of clerkship hereunto annexed, and of the act or acts of parliament requiring such service.

Circuit.

The court of
assize.

THE courts of assize, and *nisi prius*, are composed of two or more commissioners, who are twice in every year sent, by the king's special commission, all round the kingdom (except *London* and *Middlesex*, where courts of *nisi prius* are holden in and after every term, before the chief or other judge of the several superior courts, and except the four northern counties, where the assizes are taken only once a year) to try, by a jury of the respective counties, the truth of such matters of fact as are then under dispute in the courts of *Westminster-hall*. They came into use in the room of the ancient justices in eyre, who made their circuit once in seven years, for the purpose of trying causes. *Co. Litt.* 293. *see Mag. Chart.* 12.

The present justices of assize and *nisi prius*, are derived from the statute of *Westm.* 2. 13 *Ed.* 1 c. 30. 14 *Ed.* 3. c. 16. and must be two of the king's justices, of the one bench or the other; or the chief baron of the exchequer, or the king's serjeants sworn; they usually make their circuit in the respective vacations of *Hilary* and *Trinity* terms. 3 *Ed.* 1. c. 51.

Formerly

Formerly it was held that no judge or other lawyer could act in the commission of oyer and terminer, or in that of gaol delivery within his own county, where he was born or inhabited. 8 Ri. 2. c. 2. 33 H. 8. c. 24. But that local partiality, which the jealousy of our ancestors was careful to prevent, being judged less likely to operate in the trial of crimes and misdemeanors, than in matters of property and disputes between party and party, it was thought proper by the statute 12 Geo. 2. c. 27. "to allow any man to be a justice of oyer and terminer and general gaol delivery within any county of England."

Judge may try prisoners in his own county.

The judges sit by virtue of five several authorities. 1. *The commission of the peace.* 2. *A commission of oyer and terminer.* 3. *A commission of general gaol delivery.* 4. *A commission of assize*, directed to the judges and clerk of assize, to take the assizes: that is, to take the verdict of a peculiar species of jury called an assize; and summoned for the trial of landed disputes. 5. That of *nisi prius*, which is a consequence of the commission of assize being annexed to the office of those justices by the *stat. of West. 2. 13 Ed. 1. c. 30.* and it empowers them to try all questions of fact issuing out of the courts at *Westminster*, that are then ripe for trial by jury. The original of the name is this: all causes commenced in the courts of *Westminster-hall* are by the course of the courts appointed to be there tried, on a day fixed in some *Easter* or *Michaelmas Term*, by a jury returned from the county wherein the cause of action arises: but with this proviso, *nisi prius justiciarii ad assisas capiendas venerint*; unless before the day prefixed the judges of assize come into the county in question. This they are sure to do in the vacations, preceding *Easter* and *Michaelmas term*, and there dispose of the cause; which saves much expence and trouble both to the parties, the jury, and the witnesses.

Judges authority.

Trial at nisi prius.

The

The several
circuits.

The several counties in *England* are divided into
six circuits, viz.

The *Midland*, containing the counties of

Northampton,		Derby,
Rutland,		Leicester,
Lincoln,		Warwick.
Nottingham,		
	Norfolk.	
Bucks,		Cambridge,
Bedford,		Norfolk,
Huntingdon,		Suffolk.
	Home.	
Hertford,		Sussex,
Essex,		
Kent,		Surry.
	Oxford.	
Berks,		Gloucester,
Oxford,		Monmouth,
Hereford,		Stafford,
Salop,		Worcester.
	Western.	
Southampton,		Cornwall,
Wilts,		Devon,
Dorset,		Somerset.
	Northern.	
York,		Cumberland,
Durham,		Westmorland.
Northumberland,		Lancashire.

Officers,

The officers belonging to the circuit are, *the clerk of assize, the associate, clerk of arraigns, clerk of indictments, judge's marshal, cryer, clerk, and tipstaff.*

The sheriff of each county, and his deputy, are to attend the judges, and the coroner also attends to deliver in all inquisitions, &c. to the clerk of assize in court, and he is to return all writs of *venire, distringas*, and *habeas corpora*, where the sheriff is a party
in

in the suit; which writs are specially directed to him for that purpose.

Clerks of *assize* and *associates* for the several circuits are,

Home. *Jerome Knapp*, Esq.

Associate, Mr. *William Pope*.

Midland. *John Blencowe*, Esq.

Associate, Mr. *Adams*.

Norfolk. *Gerrard Dutton Fleetwood*, Esq.

Associate, Mr. *Bury*.

Northern. *John Riggs*, Esq.

Associate, Mr. *J. F. Hilditch*.

Oxford. *Meredith Price*, Esq.

Associate, Mr. *Benjamin Price*.

Western. *John Follet*, Esq.

Associate, Mr. *Vandersee*.

No clerk of assize shall act as counsel on the circuit, on pain of 10l. 33 H. 8. c. 24.

Of the Terms.

THE *Terms*, are those spaces of time, where- Terms, in the courts of justice are open, for all that complain of wrongs, or injuries, and seek their rights by course of law or action, in order to their redress, and during which the courts of *Westminster-hall* sit and give judgments, hear complaints, &c.

These *Terms* are supposed, by *Selden*, to have When instituted by *William the Conqueror*, but *Spelman* hath shewn that they were gradually formed from the canonical constitutions of the church; being no other than those leisure seasons of the year, which were not occupied by the greatest festivals or fasts; or which were not liable to the general avocations of rural business.

In very early times, the whole year was one continual term, for hearing and deciding causes; but when our legal constitution came to be settled, the commencement and direction of our law terms, Formerly the whole year was one term. were

were appointed with an eye to those canonical prohibitions; and it was ordered by the laws of king *Edward the Confessor*, "*That from Advent to the octave of the Epiphany,*" from *Septuagesima* to the *octave of Easter*, from the *Ascension* to the *octave of Pentecost*; and from three in the afternoon of all *Saturdays* till *Monday* morning, the peace of God and holy church should be kept throughout all the kingdom. And so extravagant afterwards, the regard that was paid to these holy times, that though the author of the *Mirror* mentions only one vacation of a considerable length, containing the months of *August* and *September*; yet *Britton* is express, that in the reign of king *Edward I.* no secular plea could be held, nor any man sworn on the evangelists in the times of *Advent*, *Lent*, *Pentecost*, *harvest*, and *vintage*, the days of the great litanies, and all solemn festivals: but he adds, that the bishops and prelates did nevertheless grant dispensations, of which many are preserved in *Rymer's foedera* of the time of king *Henry III.* that assizes and juries might be taken in some of these holy seasons, upon reasonable occasions. And soon afterwards a general dispensation was established in parliament by statute *West. 1. 3 Ed. 1. c. 51.* which declares, that as it is great charity to do right unto all men at all times when need shall be, it is provided, "*That assizes of novel disseisin, mort d'ancestor, and default of right should be taken in Advent, Septuagesima, and Lent, even as well as inquests, and that at the special request of the king, to the bishops.*" The portions of time not included within these prohibited seasons, fell naturally into a fourfold division, and from some festival or saint's day that immediately preceded their commencement, were denominated the terms of *Saint Hilary*, *Easter*, *Trinity*, and *Michaelmas*: which terms have been since regulated and abbreviated by several acts of parliament, particularly *Trinity* term, by stat. 32 *Hen. 8. c. 2.* and *Michaelmas* term, by stat. 16 *Car. 1. c. 6.* and again by stat. 24 *Geo. 2. c. 48.*

There are, in each of these terms, stated days ^{51 H. 3. ft. 3.} called days in bank, *dies in banco*, that is, days of ^{32 H. 8. c. 21.} appearance in the court of Common Pleas, called ^{1 Inst. 135.} usually *bancum*, or *commune bancum*, to distinguish it from *bancum regis*, which are generally at the distance of a week from each other, and regulated by some festival of the church: on some one of these days in bank, all *original writs* must be made returnable; and therefore they are generally called the returns of that term; whereof every term has more or less, said by the *Mirror*, c. 5. sec. 108. to have been originally fixed by king *Alfred*, but certainly settled as early as the stat. of 51 *Hen. 3. ft. 2.* But though many of the return days are fixed upon *Sundays*, yet the court never sits to receive these returns till the *Monday* after; and therefore no proceedings can be had, or judgment given on the *Sunday*. *Salk. 627. 6 Mod. 250. 1 Jon. 156. 2 Lill. Abr. 569.*

The first return in every term is, properly speaking, the *first day in that term*; as for instance, the *octave of Saint Hilary*, or the eighth day inclusive after the feast of that saint; which falling on the thirteenth of *January*, the *octave* therefore, or the first day of *Hilary term*, is the twentieth of *January*: and thereon the court sits to take *essoigns*, or excuses, for such as do not appear according to the summons of the writ; wherefore this is usually called the *essoign day of the term*. But the person summoned has three days of grace, beyond the return of the writ, in which to make his appearance; and if he appears on the *fourth day inclusive*, it is sufficient. *2. Lill. Abr. 569. 1 Inst. 135.*

First return of the term.

Returns

Returns of Writts.

Michaelmas Term, which contains three weeks and two days, hath four returns.

By Originals.

1. *On the morrow of All Souls.*
2. *On the morrow of Saint Martin.*
3. *In eight days of Saint Martin.*
4. *In fifteen days of Saint Martin.*

By Bill.

1. *On* next after the morrow of All Souls.
2. *On* next after the morrow of Saint Martin.
3. *On* next after eight days of Saint Martin.
4. *On* next after fifteen days of Saint Martin.

Hilary term, which contains three weeks, hath four returns.

By Original.

1. *In eight days of Saint Hilary.*
2. *In fifteen days of Saint Hilary.*
3. *On the morrow of the Purification.*
4. *In eight days of the Purification.*

By Bill.

1. *On* next after eight days of Saint Hilary.
2. *On* next after fifteen days of Saint Hilary.
3. *On* next after the morrow of the Purification.
4. *On* next after eight days of the Purification.

Easter term, which contains three weeks and six days, hath five returns.

By Original.

1. *In fifteen days of Easter.*
2. *In three weeks after Easter.*
3. *In one month after Easter.*
4. *In five weeks from Easter day.*
5. *On the morrow of the Ascension.*

By Bill.

1. *On* next after fifteen days of Easter.
2. *On* next after three weeks from the day of Easter.
3. *On* next after one month from the day of Easter.
4. *On* next after five weeks from the day of Easter.
5. *On* next after the morrow of the Ascension.

Trinity

Trinity term, which contains twenty days, hath four returns.

By Original.

1. On the morrow of the holy Trinity.
2. In eight days of the holy Trinity.
3. In fifteen days of the holy Trinity.
4. In three weeks after the holy Trinity.

By Bill.

1. On next after the morrow of the holy Trinity.
2. On next after eight days of the holy Trinity.
3. On next after fifteen days of the holy Trinity.
4. On next after three weeks of the holy Trinity.

Every day in the term (except *Sundays*, or days on which the court does not sit) is a good return by bill: the court does not sit on the feast of the Purification, *Ascension-day*, and *Midsummer-day*, unless it happens on *Friday* next after *Trinity Sunday*; then it is good by *Stat. 32 H. 8. c. 21*.

Observations on the Terms.

HILARY TERM, begins *January 23*, When Hilary (except it happens on *Sunday*) then on the term begins, *Monday* following, and ends *February* the 12th, if not *Sunday*, then on the *Monday* following.

Easter Term, begins *Wednesday* fortnight after *Easter term*, *Easter day*, and ends on *Monday* before *Whitsunday*.

Trinity Term, begins on the *Friday* after *Trinity Trin. term*, *Sunday*, that day being appointed by the 32 H. 8. c. 21. and ends the *Wednesday* fortnight after, unless it happens to be on the 24th of *June*, the feast of *St. John the Baptist*, which is no court day: then it must be adjourned to the next day. See *Gro. Jac. p. 16. 2 Bulstrode, 242*.

Michaelmas Term, begins *November* the 6th, (except it happens on a *Sunday*,) then on the *Monday* Michaelmas term, next after, and ends *November* the 28th if not *Sunday*, then the 29th. *Stat. 24 Geo. 2. c. 48*.

The issuable terms are *Hilary* and *Trinity*.

G

There

When no sittings. There are no sittings in *Westminster-hall* on *Ascension-day*, *Midsummer-day*, and the *second day of February*, being the *Purification*.

The Exchequer opens eight days before any term (except *Trinity*), before which, it opens but four days.

Appearance days.

The first and last days of every term are the days of appearance.

Observations on the Returns of Writs.

What days are to be avoided.

ALL non-juridical days must be avoided, as *Sundays*, the *feast of the Purification*, in *Hilary term*; *Ascension-day*, in *Easter term*; and *Midsummer-day*, in *Trinity term*, if it so happen (unless it happens on *Friday* next after *Trinity Sunday*, for then it is *dies juridicus*, by stat. 32 H. 8. c. 21.), and writs returnable on any of these days are not good, 2 *Inst.* 264.

The eleventh day of *November*, being the *feast of St. Martin*, in *Michaelmas term*, cannot be said to be in or upon any return; and if a writ be returnable on that day, it must be returnable on *Thursday* the *feast of St. Martin*, or any other day in the week it falls on, and if returnable the day after, the morrow of *St. Martin*.

Return of writs.

In this court every *bill of Middlesex*, *latitat*, *alias capias*, *pluries capias*, *disringas*, and *habeas corpus ad satisfaciend.* must be returnable on a day certain, as on *Monday* next, &c. and may be returnable on an *essoign*, or general return-day in term time; but then the day of the week must be expressed, as on *Friday in one month*, &c. But this is seldom used, unless on trials and writs of inquiry, in order to get some advantage in that term. If the *essoign* day happens on a *Sunday*, writs by bill must be made returnable on the first day of the term.

All

All writs of *capias*, *alias*, and *pluries*, grounded on an original out of chancery; and all writs subsequent thereto, to the outlawry, writs of *scire facias quare executionem et audiendum errores*, upon writs of error out of the Common Pleas, or other inferior courts, writs of *capias ad satisfaciendum*, *fieri facias*, and other judicial writs after judgment affirmed, *retorno habendo*, *capias in withernam*, and all other writs and process, grounded upon any *recordari facias loquelam*, *audita querela*, *accedas ad curiam*, *capias si laicus*, and every other judicial writ of chancery, must not be made returnable on a day certain, but on a general return or *essoign* day, *ubicunque*, as from the day of *Easter* in fifteen days, *wheresoever we shall then be in England*.

Writs grounded on an original.

In all actions of debt, and all other personal actions by ejectment, brought by original, there need not be fifteen days between the teste and return of any writ or writs of *venire facias*, *habeas corpora juratorum*, or *distringas juratores*, *fieri facias*, and *capias ad satisfaciendum*; and the want thereof shall not be assigned for error; but this not to extend to any writ of *ca. sa.* whereon any *exigent* after judgment is to be awarded, or to a *capias ad satisfaciendum* against the defendant, to make the bail liable: these writs are to have 15 days between the teste and return. *Stat. 13 Car. 2. c. 2. sect. 6, 7.*

When there need not be 15 days between the teste and return.

Exception.

Rules necessary to be known by Practisers.

GENERAL rules are wisely established, for attaining justice with ease, certainty and dispatch. But the great end of them being *to do justice*, the court are to see that it be really attained. *1 Burr. 301.*

All enlarged rules to shew cause made in the last term, shall be moved before the last day of the present

Enlarged rules.

present term (unless leave for postponing them shall be particularly applied for and granted).
 1 Burr. 9. M. T. 30 Geo. 2.

To be argued in the order they are entered.

All causes shall come on to be argued in the same order that they are entered, and that they shall continue to stand in the paper, in the same order till they shall be argued (without being entered a-new), and that *no cause* shall be put off without a *special application* to the court, upon some sufficient ground, before the day upon which it stands in the paper for argument. *Ibid.* 52.

Arrest of judgment.

Motions in arrest of judgment may be made within the first four days of the term, but Sunday is not to be esteemed one of the four. 4 Burr. 2130. Mich. Term, 7 Geo. 3.

May be made before entered.

A motion in arrest of judgment may be made at any time before judgment signed. Dougl. Rep. 745. Taylor v. Whitehead.

New trials.

Motions for new trials ought to be made within the first four days, but in case of delay occasioned by no wilful act of the party, it may be moved for on the fifth day, viz. where counsel had neglected to move. Dougl. Rep. 171. Bert v. Barlow. And where the attorney was taken ill, and died on the road to London. *Doe ex dem. Davie and others, v. Haddon and others.* E. T. 1784.

New trial and arrest of judgment.

Motion for a new trial, and a motion in arrest of judgment, may not be made both together, the former must precede. 1 Burr. 334. Rex v. White.

Motion in arrest of judgment may be made on the crown side, at any time before sentence pronounced. 2 Burr. 801. Rex v. Robinson.

A motion may be made in arrest of judgment, after a rule for a new trial has been discharged, and at any time before the judgment is signed. Dougl. Rep. 745. Taylor v. Whitehead.

After conviction.

After conviction of a misdemeanor, the defendant must be present in court, if he would move in arrest of judgment; though he need not be so, upon arguing a special verdict. 2 Burr. 930. Rex v. Spragg.

Personal

Personal appearance of a defendant convicted of a misdemeanor ought not to be dispensed with (upon his clerk in court undertaking for the fine), unless it be clear "that the punishment will not be corporal, only pecuniary, and not in every case even of that kind." 3 Burr. 1787, *Rex v. Hann*. When personal appearance may be dispensed with.

On the last day of a term an attachment cannot be moved for, except first for non-payment of costs. 5 Burr. 2686. 2dly. Against a sheriff for not returning a writ. 1 Burr. 657. *Trin.* 31 G. 2. And 3dly. For not bringing in the body.

And that counsel may move on the last day of term, to quash an indictment, but not to quash an order. *Ibid.* Attachment.

A joint information may not issue upon several distinct rules, for one or more information or informations against each defendant. 3 Burr. 1271. *Rex v. Haydon*. Information.

A month's time to plead, means a lunar month, or four weeks. *Ibid.* 1455. And so in all legal proceedings a month means four weeks. *Ib.* Time to plead.

That all enlarged rules to a subsequent term, should be fixed to certain days in such subsequent term, five for the first day, five for the second, and so on; and lists to be hung up in the offices, and copies thereof given to the judges the day before the beginning of every term. *Ibid.* 1842. Enlarged rules.

On the last day of term, a motion to answer the matters of an affidavit cannot be made. 4 Burr. 2502. *Jacob's case*.

When a party against whom an attachment is prayed, positively denies the charge by affidavit, this court always refuses the attachment, without entering into the merits, or the credit of the parties. *Dougl. Rep.* 516. *The King v. Vaughan*. When attachment refused.

Four days allowed for pleading in abatement are both inclusive. *Jennings v. Webb*, *Term Rep.* 1 V. 277. Plea in abatement.

Judgment may be signed for want of a plea at any time after twenty-four hours from the time of the plea demanded, *Dyche v. Burgoyne*, *ibid.* 454. provided the rule to plead is expired.

Rule taken out in vacation and dated the first day of the next term held irregular.

If a rule to return a writ be taken out in the vacation, although it be dated the 1st day of the next term, and an attachment be granted for not obeying it, the court will on motion set aside the attachment. For such a rule is false in itself, irregular, and improper. *The King v. Sheriff of Cornwall, Term Rep. 1 V. 552.* This rule was taken out before the commencement of *Mich. term*, and intitled of the first day of that term.

If plaintiff dies after verdict.

If plaintiff dies after verdict and before judgment entered thereon, a *scire facias* must be awarded before execution. *Earl v. Brown, 1 Wils. 302.*

If pending argument either party dies,

If pending an argument on a special verdict, and the court takes time to consider thereon, either party dies, the judgment will be ordered to be entered as of the term in which judgment ought to have been signed. *1 Burr. 226. 147. 4 Burr. 2277.*

Affidavits.

If an affidavit be made to ground a motion in a cause in this court, it must be intitled "*in the king's bench*," otherwise it is a good objection. and the rule obtained on such an affidavit will be discharged. The affidavit was sworn before Mr. Justice Grose, but not intitled in the king's bench. Lord Kenyon gave notice of this to the attornies present, and said they ought to be more careful, for he thought them answerable to their clients for the consequences. Master certified, that this was the constant course of the court. *31 May, E. T. 31 Geo. 3.*

Demand of plea.

A demand of a plea before the defendant has appeared, or the plaintiff filed common bail for him, is a nullity. *Cook v. Raven, 1 Term Rep. 635.*

Rule to abide by plea.

After rule to abide by a plea, or plead such other, defendant can only plead the general issue and give notice of set-off. *Ibid. 693. Cockran v. Robertson.* Or he may plead the set-off. *Ibid.*

Arrest.

Arrest.

AN arrest in a civil cause is defined to be, the Arrest.
apprehending or restraining one's person by
process in execution of the command of some court,
or officer of justice. *Wood's Inst.* 575.

By *stat. 12 Geo. 1. c. 29.* it is enacted, " That, None to be held
" from and after the 24th day of *June 1726*, no to special bail in
" person shall be held to special bail upon any a superior court
" process issuing out of any superior court, where under 10*l*;
" the cause of action shall not amount to the sum
" of ten pounds or upwards; and that in all cases
" where the cause of action shall not amount to the
" sum of ten pounds or upwards, in any superior
" court (and the plaintiff or plaintiffs shall proceed
" by the way of process against the person), he,
" she, or they shall not arrest, or cause to be
" arrested, the body of the defendant or defendants,
" but shall serve him, her, or them personally,
" with a copy of the process.

" That from and after the said 24th day of Where the cause
" *June 1726*, in all cases where the plaintiff or of action
" plaintiffs cause of action shall amount to the sum amounts to 10*l*.
" of ten pounds, affidavit shall be made and filed of affidavit to be
" such cause of action (which affidavit may be made made thereof,
" before any judge or commissioner of the court and the sum in-
" out of which such process shall issue, authorized dorbed on the
" to take affidavits in such courts, or else before back of the
" the officer who shall issue such process, or his writ.
" deputy), which oath such officer, or his deputy,
" are hereby empowered to administer; and for
" such affidavit one shilling, over and above the
" stamp duties, shall be paid, and no more; and
" the sum or sums specified in such affidavit, shall
" be indorsed on the back of such writ or process;
" for which sum or sums so indorsed the sheriff, or
" other officer to whom such writ or process shall
" be directed, shall take bail, and for no more: But
" if, after the said 24th of *June 1726*, any writ Where there is
" or process shall issue for the sum of ten pounds no affidavit.

“ or upwards, and no affidavit and indorsement shall be made as aforesaid, the plaintiff or plaintiffs shall not proceed to arrest the body of the defendant or defendants, but shall proceed in like manner as is by this act directed in cases where the cause of action does not amount to the sum of ten pounds, or forty shillings, or upwards, as aforesaid.” *Ibid. sect. 2.*

Before the making of this act, a defendant might have been arrested for any sum of money, however trifling or inconsiderable, upon a mere suggestion, without any affidavit of its being due.

The arrest cannot be made on a Sunday, except an escape, or by bail.

No arrest can be made on process served on a Sunday; except for treason, felony, or breach of the peace. 29 *Car. 2. c. 7. s. 6.* 1 *Salk. 78.* But a prisoner who has escaped, may be retaken on a Sunday, and that either by the officer, or upon a fresh pursuit, or by virtue of an escape warrant. 2 *Lord Ray. 1028.* 2 *Salk. 626.* Also bail may take their principal upon a Sunday, in order to surrender him. 1 *Atk. 239.* 6 *Mod. 251.*

No sheriff, &c. in Wales, &c. shall hold persons to special bail, unless the cause of action be 20*l.*

By the 11 & 12 *W. 3. c. 9. sect. 2.* it is enacted, “ That no sheriff or other officer within the principality of *Wales*, or counties palatine, upon any writ or process issuing out of any of his majesty’s courts of record at *Westminster*, shall hold any person to special bail, unless an affidavit be first made in writing, and filed in that court, out of which such writ or process is to issue, signifying the cause of action, and that the same is twenty pounds and upwards; and where the cause of action is twenty pounds and upwards, bail shall not be taken for more than the sum expressed in such affidavit.”

Bail not to be taken for more than expressed.

After 1 July 1779, no person shall be arrested, or held to special bail, upon any process issuing out of an inferior court for less than 10*l.*

By the 19 *Geo. 3. c. 70. s. 1.* it is enacted, “ That from and after the 1st of July 1779, no person shall be arrested or held to special bail, upon any process issuing out of any inferior court, where the cause of action shall not amount to the sum of ten pounds, or upwards; but that copies of process shall be served (for the service

“ of

“ of which process, a sum not exceeding two shillings and sixpence shall be allowed in costs), and
 “ the like proceedings shall be had thereupon in
 “ such inferior courts, in all cases where the cause
 “ of action shall not amount to the sum of ten
 “ pounds, or upwards, as are directed to be had by
 “ 12 Geo. 1. c. 29. in such inferior court, in all
 “ cases where the cause of action shall not amount
 “ to the sum of forty shillings.” *Sect. 1.*

“ That from and after the 1st of July 1779, in
 “ all cases in such inferior court (having jurisdiction
 “ to the amount of ten pounds, or upwards),
 “ where the cause of action shall not amount to
 “ ten pounds, or upwards, the like affidavit shall
 “ be made and filed of such cause of action, and
 “ proceedings shall be had thereupon, as are directed
 “ by the said act of 12 Geo. 1. to be had,
 “ where the cause of action amounts to the sum of
 “ forty shillings, or upwards, in such inferior
 “ court.” *Sect. 2.*

By the 12 Geo. 1. c. 29. “ The inferior courts
 “ could hold to bail for forty shillings, or upwards;
 “ if under that sum, the party plaintiff was to
 “ proceed by way of service of the copy of process
 “ on the defendant personally.”

By 1 Geo. 2. c. 14. s. 15. it is enacted, That no
 person whatsoever, who shall list and enter himself
 to serve his majesty, as a seaman on board any of
 his majesty's ships or vessels, shall be liable to be
 taken out of his majesty's service by any process or
 execution whatsoever, other than for some criminal
 matter, unless for a real debt, or for other just
 cause of action, and unless, before the taking out
 such process or execution, not being for a criminal
 matter, the plaintiff or plaintiffs therein, or some
 other person or persons, on his or their behalf, shall
 make affidavit before one or more judge or judges
 of the court of record, or other court, out of which
 such process or execution shall issue, or before some
 person authorized to take affidavits in such courts,
 that to his or their knowledge the sum justly due
 and

Proceedings
 therein in causes
 of 10l. or up-
 wards, and in
 causes of 40s.
 or upwards.

No seaman shall
 be liable to be
 taken out of his
 majesty's service
 otherwise than
 for some criminal
 matter, un-
 less the debt a-
 mount to 20l.

and owing to the plaintiff or plaintiffs, from the defendant or defendants, in the action, or cause of action, on which such process shall issue, or the debt or damage and costs for which such execution shall be issued out, *amounts to the value of twenty pounds* at the least, a memorandum of which oath shall be marked on the back of such process or writ, for which memorandum or oath no fee shall be taken; and if any person shall be nevertheless arrested, contrary to the intent of this act, it shall and may be lawful for one or more judge or judges of such court, upon complaint made thereof by the party himself, or by any his superior officer, to examine into the same by the oath of the parties, or otherwise, and by warrant under his or their hands and seals, to discharge such seaman so arrested, contrary to the intent of this act, without paying any fee or fees, upon due proof made before him or them, that such seaman so arrested was actually belonging to one of his majesty's ships or vessels, and arrested contrary to the intent of this act, and also to award to the party so complaining such costs, as such judge or judges shall think reasonable; for the recovery whereof he shall have the like remedy that the person who takes out the said execution might have had for his costs, or the plaintiff in the said action might have had for the recovery of his costs, in case judgment had been given for him, with costs, against the defendant in the said action.

Plaintiff upon notice, &c. may enter a common appearance, and proceed to judgment, &c.

Sec. 16. That it shall and may be lawful to and for any plaintiff, upon notice first given in writing of the cause of action, to such seaman or seamen in his majesty's service, or left at his or their place of residence, before his entering into his majesty's service, to file a common appearance in any action to be brought for or upon account of any debt whatsoever, so as to entitle such plaintiff or plaintiffs to proceed therein to judgment and outlawry, and to have an execution thereupon, other than against the body or bodies of him or them so actually

actually belonging to one of his majesty's ships, as
afore said.

A seaman upon the ship books, though he has
absented himself, is a seaman within the act.
Barnes 95. Armourers, gunners, &c. enlisted as
common seamen, are within it. *Barnes* 114. 1 *Str.*
2. 7. 1 *Black. Rep.* 30.

By *stat. 31 Geo. 3. c. 13. s. 65.* "No person who
"is or shall enlist or enter himself as a volun-
"teer in his majesty's service as a soldier, shall be
"liable to be taken out of his majesty's service by
"any process or execution whatsoever, other than
"for some criminal matter, unless for a real debt
"or other just cause of action, and unless before
"the taking out such process or execution (not being
"for a criminal matter), the plaintiff or some per-
"son on his behalf shall make affidavit, &c. that to
"his or their knowledge the original sum justly due
"and owing to the plaintiff from the defendant, in
"the action, or cause of action, on which such pro-
"cess shall issue, or the original debt for which such
"execution shall be sued out, amounts to 20*l.* at least,
"over and above all costs of suit in the same action,
"or in any other action on which the same shall be
"grounded; a memorandum of which oath shall be
"marked on the back of such process or writ; and if
"any person shall be arrested contrary, it shall be
"lawful for one or more judge of such court, upon
"complaint made thereof by the party himself,
"or by any his superior officers, to examine into
"the same by the oath of the parties, or otherwise,
"and by warrant under his or their hands and seals,
"to discharge such soldier, without fee, upon
"due proof made that such soldier so arrested was
"legally enlisted as a soldier in his majesty's ser-
"vice, and arrested contrary to the intent of
"this act; and also to award to the party so com-
"plaining, such costs as such judge shall think rea-
"sonable; for the recovery whereof he shall have
"the like remedy that the person who takes out
"the said execution might have had for his costs,
"or

No volunteer
soldier liable to
process, unless
for a real debt
of 20*l.*

Term Rep.
270.

Oath of the debt
to be made be-
fore a judge, &c.

and a memoran-
dum thereof
marked on the
back of the pro-
cess.

"or the plaintiff in the like action might have had
 "for the recovery of his costs, in case judgment
 "had been given for him with costs against the de-
 "fendant in the said action."

Plaintiff may
 file common
 appearance, and
 proceed to exe-
 cution against
 the goods.

Sec. 66. "Any plaintiff, upon notice first given
 "in writing, of the cause of action to such person
 "or persons so entered, or left at his or their last
 "place of residence before such inlisting, to file a
 "common appearance in any action to be brought
 "for or upon account of any debt whatsoever, so as
 "to entitle such plaintiff to proceed therein to
 "judgment and outlawry, and to have an execu-
 "tion thereupon, other than and against the
 "body or bodies of him or them so inlisted as afore-
 "said."

Who are within
 the act.

Serjeants are within this act as well as private
 men, so is a drummer. 1 *Black. Rep.* 29. 1 *Wils.*
 216. So is a gunner in the train of artillery.
Stra. 7. So a trooper just inlisted. 1 *Stra.* 2. So
 recruits just inlisted. But an out-pensioner of
 Chelsea hospital is not. *Barnes* 432.

But though they cannot be arrested, yet such per-
 sons may be surrendered by their bail in their own
 discharge. 1 *Burr.* 339. *Bond v. Isaac.* 1 *Str.*
 641.

Who not.

This act does not extend to soldiers imprisoned
 for disobeying orders of justices. 2 *Term Rep.* 270.
 Or on any other criminal account.

The penalty for
 arresting of any
 person at the suit
 of another, not
 knowing there-
 of.

"If a person procure another to be arrested in the
 "Marshalsea, or in any other court within London,
 " &c. at the suit of any person, where there is no
 "such person known, or without the plaintiff's
 "consent; every person who shall procure any ar-
 "rest, &c. and shall be accused by indictment,
 "presentment, or by the testimony of witnesses, or
 "other due proof, shall suffer six months impris-
 "onment, without bail or mainprize; and pay to
 "the party arrested treble costs, and forfeit the sum
 "of ten pounds for every such offence; to be re-
 "covered by action of debt, &c. against such per-
 "son or persons, their heirs, executors, or admi-
 "nistrators,

"nistrators, as should or ought to pay the same, by
 "virtue or force of this act; in which action no
 "essoign shall be allowed." 8 *Eliz. c. 2. sect. 5.*

For what a Person may be held to bail.

Where there is a certain demand, which amounts to 10*l.* or upwards, as for money paid, laid out, and expended, money lent and advanced, money had and received, a demand on an account stated and settled, goods sold and delivered, work done, covenant for payment of money, money due on bond, for fees and disbursements as an attorney, or on agreement to pay a certain sum to the plaintiff (not by way of penalty), or on a judgment recovered, the defendant may be held to bail *of course*, on a concise affidavit, adapted to the cause of action.

So if there be a general judgment against an ex- *Executors, &c.*
 ecutor or administrator, if he has been guilty of a *devastavit*. 1 *Salk.* 98. 1 *Vent.* 355.

So he may be held to bail on a judgment by default against him, after the sheriff has returned a *devastavit*. *Comb.* 206. *Carth.* 264. 1 *Mod.* 16. 1 *Salk.* 98.

In trover the defendant may be held to bail of course. 2 *Str.* 1122. *Cowp.* 529. For this is more an action of property than a *tort*. 1 *Wils.* 23. *Cattin v. Cattin*. And there is no occasion for a judge's order. *Ibid.*

In an action on 26 *Geo. 2. c. 21.* for having un- *So may be held*
 sealed wrought silks in his custody, special bail is *to bail on 26*
 required by the eighth section, and in this case af- *Geo. 2. c. 21.*
 fidavit need not be positive, for the act does not
 require affidavit at all. 3 *Burr.* 1569. *Rex v. Reberd.*

In actions on 11 and 12 *W. 3.* for offences in *So on 11 and 12*
 exporting wool, defendant may be held to bail, *W. 3.*
 but the cause of action must appear in the writ.
 In *scandalum magnatum* plaintiff may have special *So on scan. mag.*
 bail on motion and order. *Earl of Stamford v.*
Goodhall, L. Ray. 74. 1 *Sid.* 183. 2 *Mod.* 215.

Although

So if nonprossed
on a former
action.

Although plaintiff has been nonprossed in a former action for want of a declaration, yet defendant shall find special bail to a second action, for he suffers enough by paying costs in the first action, and therefore ought not to be in a worse condition than before. *L. Ray. 649. Str. 439. Turton v. Hayes.*

So on judgment
if he neglects
to plead bank-
ruptcy.

Also defendant may be held to bail in debt on a judgment, though defendant might have pleaded bankruptcy to the first action. *Str. 477. Combs v. Blackall.* Also on a contract to transfer stock borrowed. *Adams v. Verells, Ibid. 497.*

On an award.

Bail is required in an action on an award, where the arbitrator awarded 11l. and 3l. costs; although he was originally held to bail for 11l.: For the reference put an end to the first action, and a new cause of action arose by the arbitration. *Collins v. Powell. 2 Term Rep. 756.*

When for a pe-
nalty.

Defendant may be arrested for the penalty of a bond, conditioned for the performance of a promise of marriage, where the penalty is the real debt, or rather in nature of stated damages. *1 Wils. 59. 3 Burr. 1351. 1373. Dougl. 450.* But not for the penalty of a bond. *Kirk v. Strickland. Dougl. 450.* Conditioned for payment of money.

Bail upon the
9th of Ann.
c. 14. against
the winner.

Upon the 9 Ann. c. 14. which gives an action of debt within three months against the winner, the question was, whether the defendant could be held to bail? the defendant's counsel comparing it to the case of actions upon penal statutes, where no bail is ever required. But the court held, there ought to be special bail in this case, which is at the suit of the party grieved, and wherein the defendant is a debtor to the plaintiff; and the clause is to be considered as remedial: and therefore, upon consideration, and talking with the other judges, special bail was ordered. *Turner v. Warren, Str. 1079.*

Defendant may
be held to bail
in debt on the
judgment, it, &c

In debt on the judgment, the defendant may be held to bail (if no bail be given in the original action), notwithstanding a writ of error he brought on the original

original action, and bail be given on the writ of error. *Comyn's Rep.* 556. *Comb.* 556.

In an action for double rent, upon holding over, *Double rent.* upon the 4 *Geo.* 2. c. 28. plaintiff may require special bail for the double rent.

In what Actions Defendant cannot be held to Bail.

But where the damages are uncertain, as in *covenant* Where the defendant cannot be held to bail.
where no money is covenanted to be paid, *trespass*, *assault*, *battery*, *conspiracy*, *assault* and *false imprisonment*, *slander* (except in *slander of title*), *actions against bail on the bail bond*, *penal statutes* (unless expressly enacted), *malicious prosecution*, *action for crim. con. on bond for performance of covenants*, *debt on recognizance of bail*, *replevin bond*, nor on a *non suit for costs*. 5 *Burr.* 2660. The defendant cannot be held to bail of course.

In actions of *assault*, *imprisonment*, *scand. magn.* Judge's order or rule of court,
and other *personal wrongs*, in which it is apparent the damages will exceed 10l. the court, or any judge, on an affidavit of the circumstances, will give leave to the plaintiff to sue out a writ to hold defendant to special bail: But in these cases, the defendant must be stated, that he is going to quit the kingdom. *Vide* 4 *Burr.* 2117. *Sid.* 307. *Ray.* 74. *Lev.* 39. *R. M.* 8 *Ann. c.* 1 *Salk.* 99.

In an action of debt upon judgment, whether *Debt on the judgment.*
after verdict or by default, the defendant cannot be arrested, if he was *previously held to bail in the original action*. *Say. Rep.* 160.

Nor on a judgment, unless the *original debt or damages* (without the costs) amounted to 10l. *Palmer* If debt or damages do not amount to 10l.
v. Needham. 3 *Burr.* 389. 1 *Will.* 120. *Cow. Rep.* 128. *Str.* 975. 1077. 4 *Burr.* 2117. *Bell-*
ther v. Gibbs. *R. E.* 5 *Geo.* 2. *Contia*

Bail cannot be had on an action on the *second judgment*, where bail has been given on the first. *Second judgment.*
Chambers v. Robinson. 2 *Str.* 782.

What

What Persons are not to be held to Bail in Civil Cases.

PEERS of the realm, members of parliament, peeresses by birth, 1 *Inst.* 131. 2 *Inst.* 50. 4 *Bacon's Abr.* 228. ; peers of Scotland, 2 *Str.* 990. ; a peeress by marriage, *Co. Lit.* 16. 6 *Co.* 53. *Dyer* 79. ; members of convocation actually attending thereon, 8 *H. 6. c.* 1. ; bishops, ambassadors, or the domestic servant of an ambassador, *really and bona fide in that capacity*, *Stat. 7 Ann. c.* 12. 3 *Wils.* 33. ; 2 *Str.* 797. 2 *L. R.* 1524. ; 4 *Burr.* 2016, 17. ; 3 *Burr.* 1676. ; the king's servants, 1 *Ray.* 152. 8 *Mod.* 12. ; marshal, warden of the Fleet, 1 *Vent.* 65. ; clerks, attornies, and all other persons attending the courts of justice, 4 *Inst.* 72. 2 *Inst.* 551. 12 *Mod.* 163. ; clergymen performing divine service, and not merely staying in the church with a fraudulent design, 50 *Edw.* 3. c. 5. 1 *R.* 2. c. 16. ; suitors, *Bro. Privil.* 57. ; witnesses subpoena'd, and other persons necessarily attending any court of record upon business, *Sir T. Raym.* 101. 1 *Vent.* 11. *Rules in Chan.* 217. ; witnesses properly summoned before commissioners of bankrupt, or other commissioners under the great seal, 1 *Atk.* 54. ; heirs, executors, or administrators, *R. M.* 1654. ; sailor or volunteer soldier (unless the debt is twenty pounds), 1 *Geo.* 2. c. 14. f. 15. 31 *Geo.* 3. c. 13. f. 65. Also the courts not only protect the persons of their attendants, but likewise all those things that are necessary for their journey or the defence of their suit, 2 *Roll. Abr.* 273 ; but the privilege the court allows their officers is restrained to those suits only, which they bring in their own right ; for if they sue or be sued as executors or administrators, they then represent common persons, and are not intitled to privilege. *Hobb.* 177. *Dyer* 24. pl. 150. 2 *Sid.* 157. *Latch.* 199. *Godb.* 10.

Witnesses,

Heirs, executors,
or administrators,

When not allowed.

Irish peers.

But this privilege does not extend to *Irish* or other foreign peers, 2 *Inst.* 48. 3 *Inst.* 70. or to peeresses by marriage,

marriage, if they afterwards intermarry with commoners. Co. Lit. 16. 2 Inst. 50. 7 Co. 15. 16.

And though the servants of peers necessarily employed Servants of peers about their persons and estates, could not formerly be arrested, 2 Str. 1065. 1 Will. 278.; yet this privilege seems to have been taken away by the statute, 10 Geo. 3. c. 50. f. 2.

Members of corporations aggregate, and hundredors, Corporations, not being liable to a *capias*, cannot be arrested in their corporate capacity, or on the statutes of hue and cry, &c. Bro. tit. Corp. 43. 3 Keb. 126, 7.

Where an executor or administrator hath personally promised to pay a debt or legacy, he may be arrested. Executor or administrator may. *See 5 Annot. 294. 6 D.D. 5*
1 Term Rep. 716. Mackenzie v. Mackenzie.

Also if a privileged person brings a joint action, this destroys his privilege; because those with whom he joins are not officers of the court, nor intitled to the attachment which the court grants against its own officers. 2 Roll. Abr. 274. When privilege discharged.

In case a bankrupt shall be arrested coming to surrender, or after his surrender shall be arrested within 42 days, that then on producing the summons, or notice, under the hands of the commissioners or assignees, and giving the officer a copy thereof, he shall be discharged; and if detained, such bankrupt shall have for his own use five pounds for every day he is detained. Stat. 5 Geo. 2. c. 30. f. 5. A bankrupt privileged for forty-two days.

The bankrupt must in this case, to protect himself, make an *actual surrender*; because the sooner he does it, the better for his creditors. Therefore the court held, that a bankrupt coming from Holland to surrender on the forty-second day, and his time enlarged, he did not do so on the forty-second day, that the arrest was good. *Kenyon v. Solomon. Cowp. Rep. 156.*

In an action against husband and wife, the husband alone is liable to be arrested, and shall not be discharged until he have put in bail for himself and wife. If the wife be arrested.
1 Vent. 49. 1 Mod. 8.; and if she is arrested, she shall be discharged on common bail. 1 Term Rep. 486. 1 Salk. 115.

H

In

What Persons not to be Arrested.

In what Cases Defendant may be held to bail a second Time.

The general rule is, when defendant has been once arrested, he cannot be arrested again for the same cause of action. *Nemo debet bis vexari pro eadem causa.* 2 Str. 1209.

If a second writ pending the first is taken out, common bail.

But when the defendant was arrested on a writ, pending the *first cause*, and wherein he had been previously arrested, the court said, the plaintiff had been too quick, for he should have had the costs taxed and paid before he took out the new writ, and discharged the defendant on common bail. *Belisante v. Levy.* 2 Str. 1209.

Where a man was held to bail in a second action pending first.

In a similar case, where it appeared that the bail in the prior action were foresworn, the court refused to assist the defendant, and said the plaintiff was right in laying hold of him as he did, for had he discontinued before, the defendant would probably have run away, and therefore discharged the rule for common bail. *Olmus v. Delany.* Str. 1216.

After nonpros, defendant shall give bail to second action.

Where the plaintiff is nonprossed for want of declaration, and he pays the costs, it is holden that he may again arrest the defendant, for he suffers enough by paying the costs, and therefore ought not to be in a worse condition than before. *Turton v. Hayes.* Str. 439. *Lord Raym.* 1649.

So where action is misconceived.

So where he misconceives his action, and moves to discontinue, and pays the costs, he may take out a new writ, and hold the defendant to bail *de novo.* 2 Wils. 381.

But not when justified without leave of court.

But where the bail had justified for 2334/. and the plaintiff not liking them, obtained the usual side bar rule to discontinue, not disclosing that bail had justified; and then brought a new action on the same bonds, and laid the venue in *Middlesex* instead of *London*, made a fresh affidavit of the debt, and had the declaration marked by the clerk of the rules to charge him in custody, in order to detain him till the next term; on disclosing the matter by the clerk of the rules to the court, the court sent for the

the attorney, whose counsel cited the case in *Sir*. 1216. as in point. The court at first hesitated what to do; but held it to be a trick and an unwarrantable conduct in the attorney, and that it should not have the intended effect, for he ought to have asked leave of the court to charge the defendant in custody, disclosing the whole of the case to them; and at first thought of making a rule to shew cause why the plaintiff should not be at liberty to do so. But at length they discharged the side bar rule, which gave plaintiff leave to discontinue. So that the bail to the former action (who had justified) still remained liable to their recognizance. *Belchier v. Gansell*, 4 Burr. 2052.

Affidavits.

AFFIDAVIT signifies in law, an oath in writing; and to make *affidavit* of a thing, is to testify it upon oath. An *affidavit*, generally speaking, is an oath in writing, sworn before some person who hath authority to administer such oath; and the true place of *habitation*, and true *addition* of every person who shall make an affidavit, is to be inserted therein, 1 *Lill. Abr.* 44. 46. *Affidavits* ought to set forth *matter of fact only*, which the party intends to prove by his affidavit, and not to declare the merits of the cause, of which the court is to judge. What it is to contain.

An affidavit must set forth the matter *positively*, and all *material circumstances* attending it, that the court may judge whether the deponent's conclusion be just or not. 1 *New Ab.* 66.

The stat. 12 Geo. 1. c. 29. requires the cause of action to be *sol.* to hold to special bail; and both the statute and the established rules of the court require a *positive oath* to be made of the debt, and not couched in words of reference, except in the case of assignees, executors, &c. *Term Rep.* 1 V. 83. and they must swear as to their belief of the debt.

To be filed.

The affidavit must be *filed* before or at the time of *suing out the writ*, or the court will discharge the party from the arrest, on filing common bail.

Who may make the affidavit of the debt.

An affidavit of the cause of action may be made by the *plaintiff*, *his wife*, or a *third person*, and may be sworn before the plaintiff's attorney if he be a commissioner. *Rule E. 15 G. 2.* But it must be sworn by some person who is competent to be a witness; and therefore it is bad if made by a person convicted of felony. *5 Mod. 74. 2 Salk. 261.*

Cannot join debt and case in one stamp.

If the plaintiff joins *debt* and *assumpsit* together in one affidavit, the court will discharge defendant: in this case, the court did not seem to lay much stress on the objection of its being a fraud on the stamp duty.

5 Burr. 2690. Crooke, and another, v. Davis.

Nor against several defendants, where the action is several.

So where several defendants are joined, and the cause of action is *several*, there must be several stamps for the affidavit. *Dougl. Rep. 217. Gilby v. Lockyer.*

By *stat. 29 Car. 2. c. 5. s. 1.* The judges, &c. of the courts at *Westminster*, by commission, may empower persons in the several counties of *England*, to take affidavits concerning matters depending in their several courts.

Who to be made before.

The affidavit may be made before any judge of the court, or commissioner of such court in the country, even though such commissioner is concerned as attorney for the plaintiff, *R. E. 15 Geo. 2.* or before the *officer who issues the writ*, or *his deputy*: for which affidavit one shilling is to be paid above the stamp duties, and to be filed with such officer, or his deputy. *Ibid. Reg. 3.*

Is, to be paid.

To be ingrossed on treble sixpenny stamp paper.

The court will not receive a supplemental affidavit.

Where there is a good cause of action, and a proper affidavit, the defendant may be held to bail, and the court will not go out of the affidavit, or prejudice the cause, by entering into the merits upon which it is founded. *1 Salk. 100.* The plaintiff, therefore, must stand or fall by his affidavit; it being the constant and uniform practice, not to receive a *supplemental* or *explanatory* affidavit on the part of the plaintiff,

plaintiff, nor a counter or contradictory one, on the part of the defendant. *Heathcote v. Gosling*, 2 Str. 1157. 1 Wils. 335. *Emerson v. Hawkins*.

In what Cases the Affidavit is not sufficient.

If the affidavit be, that defendant borrowed 2000*l*. of plaintiff on bottomry, which money is now due and owing to plaintiff by virtue of said bond, as thereby may appear, it is not sufficient, for the money may be paid and not appear. Str. 1157. *Heathcote v. Gosling*. Affidavit as appears on bond, not good.

The plaintiff made oath of his debt before a burgo-master in *Holland*, who certified an account thereof to the plaintiff's agent here, who makes an affidavit that he believes the said oath and account current are true, and defendant was held to bail: common bail was ordered: for a *positive affidavit* is always required, and affidavits going only to belief, are insufficient. *Van Morsell v. Julian*, 1 Wils. 231. There must be a positive affidavit to hold to bail.

That defendant was indebted to him in such a sum as appears by agreement bearing date such a day. Common bail ordered. *Jennings v. Martin*. 3 Burr. 1447. For the affidavit is only couched in terms of reference. Vide 1 Burr. 655. *Pomp v. Ludvigson*, the like resolution. As appears by agreement.

That defendant is indebted to plaintiff "in 20*l*. according to the bill delivered by the plaintiff to the defendant," is insufficient. *Williams v. Jackson*, 3 Term Rep. 575. According to bill delivered.

Affidavit by a merchant in *London*, the defendant Merchant, owes plaintiff so much, as appears by plaintiff's affidavit made in *Amsterdam*, which deponent believes to be true, not sufficient. Str. 1209. *Rios v. Belifante*.

Affidavit by a third person, that defendant is indebted to plaintiff, as appears by account, or by bill and indorsement, or bond, under defendant's hand, not sufficient. 1 Wils. 121. 279. *Rollin v. Mills*. Third person.

But affidavit that defendant is indebted to plaintiff in 10*l.* as he computes it, is sufficient. 2 *Burr.* 1032. *Moulty v. Richardson.*

As appears by
the bill, not
good.

On affidavit that the defendant is indebted to the plaintiff *Rollin* in a certain bailable sum of money, by virtue of a bill of exchange, indorsed by the payee for the plaintiff, *as appears by the said bill and indorsement*, and that *Mills* the defendant accepted the bill, but had refused payment, that the bill was protested, and though the affidavit was positive *that the defendant* had accepted the bill, court ordered common bail, because the affidavit only swears that the defendant is indebted, *as appears by the said bill. Rollin v. Mills.* 1 *Wils.* 279.

Book-keeper.

So if made by plaintiff's book-keeper, that he was indebted in 3400*l.* as deponent verily believes. *Str.* 1226. *Claphamson v. Bowman.*

In what Cases it is sufficient where the Plaintiff sues as Assignee, Executor, &c.

Where an assignee of a bond swore that the obligor was indebted in 90*l.* for principal and interest, as he believed, this was held sufficient. *Loveland and Bassett.* 1 *Wils.* 232.

Executor.

If an executor swears to the books of the testator, and that he believes them to contain a true account, and that the debt is still unpaid, it is sufficient to hold to special bail. But an affidavit by an executrix, that the defendant was indebted to her testator (so much) *as appears* by the books of her testator, was held insufficient. *Str.* 1219. *Walton v. Fransham.*

An executor, &c.
in his affidavit
must swear as to
his belief, to
hold to bail.

In the case of *Sheldon*, executor, v. *Baker*, Mr. *J. Buller* said, The general rule is, that there must be a *positive affidavit*: the cases of *assignees, executors, &c.* are by way of exception to that rule; then a party claiming under that exception must shew a case where it has been allowed. In those cases, if he swears that "*he believes it to be true,*" this is as much as he can do, because the transaction in general does not come within his own knowledge. But there is no case where the affidavit has been allowed to be sufficient to hold the defendant to special bail, without adding *the belief of the party who made it.* The affidavit

affidavit was, "indebted to him as executor for money
"had and received by defendant as receiver of the rents,
"and as appears to deponent to be the true balance upon
"the stewardship account by him delivered to this de-
"ponent, and from the several articles of disbursement
"therein contained." He ought to have said that he
believed the account to be true; therefore held in-
sufficient. 1 Term Rep. 84.

If assignees swear that defendant is indebted, as Assignees,
appears to them by the last examination of the bankrupt,
as they believe, and that they have not received the debt,
or any part of it, and that they believe it to be still due,
it is sufficient. 4 Burr. 1992. Barclay assign. v. Hunt.

Affidavit stated that defendant was indebted for
goods sold, as appears by the bankrupts books; and
as the deponent believed held good. Swaine v. Gram-
mond. 4 Term Rep. 176.

The affidavit on the lottery act, 22 Geo. 3. c. 47. Lottery act.
alleged, that defendant had promised and agreed to
pay to several persons by name, divers sums of money,
on certain events and contingencies, relating or ap-
plicable to the drawing of certain tickets or numbers,
&c. without adding, that defendant had taken and re-
ceived any money in consideration of such promises, was held
good. Holland, *qui tam*, v. Bothman. 4 Term Rep. 228.

An affidavit to hold to bail on the lottery act, 27 Geo. 3. c. 1. should specify the nature of the
offence, and aver that the defendant has incurred the
forfeiture: but the offence need not be described cir-
cumstantially; nor is the plaintiff obliged to swear
that the defendant is indebted to him to the amount
of the penalty, because any other informer might
previously have commenced the action. Davis v.
Mazzinghi. 1 Term Rep. 705.

An affidavit to hold to bail, stating a promise
made by the defendant's executor, &c. to pay a
legacy of 100*l.* bequeathed by his testatrix, and
confessing assets to the amount of 280*l.* but that
the plaintiff, not receiving the said sum, caused se-
veral applications to be made to the defendant with-
out effect, therefore that the defendant is justly in-
debted to the plaintiff in 100*l.* for the reasons herein

On lottery-act,
should specify
nature of the
offence.

An affidavit stat-
ing promise by
executor, should
say, debt is still
due, &c.

before mentioned. Court held that an affidavit to hold to bail must be *positive*, and nothing ought to be left to be collected by *inference*. It should have stated in addition, *that the sum is still due and unpaid*.

Mr. Justice Buller.—The court is so strict in construing affidavits to hold to bail, that in one instance they held an affidavit; “*that the defendant was indebted to the plaintiff in 5000l. for money had and received, and for which he had not accounted,*” to be insufficient, which was a much stronger case than the present; and, if I am not mistaken, the case which was cited at the bar has since been over-ruled. An affidavit to hold to bail must be as strong and positive as an affidavit to change the venue. The cases of assignees, &c. are exceptions. *Mackenzie v. Mackenzie*, 1 Term Rep. 716.

Lottery a 7. A plaintiff who sues for penalties under the lottery act, 27 Geo. 1. c. 1. s. 2. must make an affidavit previous to the suing out of the writ, specifying the amount of the penalties. *King, qui tam, v. Horne*, 4 Term Rep. 349.

As appears by master's allocatur. An affidavit to hold to bail, that defendant is indebted to the plaintiff in a certain sum, “*as appears by the master's allocatur,*” is not sufficiently positive, because he should have sworn, “*the debt is still due.*” *Powell v. Portherch*, 2 Term Rep. 55.

According to bill delivered. An affidavit to hold to bail, that defendant is indebted to the plaintiff in 20l. according to the bill delivered by the plaintiff to the defendant, is insufficient. *Williams one, &c. v. Jackson*, 3 Term Rep. 575.

Affidavits.

Easter Term, 31 Geo. 3d.

All affidavits

taken by illi-

terate persons

must be read and

expressed in the

jurat by the

commissioner.

It is ordered, that from and after the last day of Trinity term next, where any affidavit is taken by any commissioner of this court made by any person, who from his or her signature appears to be *illiterate*, the commissioner taking such affidavit shall certify or state in the jurat *that the affidavit was read in his presence*

since to the party making the same, and that such party seemed perfectly to understand the same; and also that the said party wrote his or her signature in the presence of the commissioner taking the said affidavit.

In the King's Bench.

John Doe, of Milk-street, Cheap-side, London, taylor, For work done and materials found. Every tradesman's bill for work done may be included in this affidavit. For goods sold and delivered.

maketh oath and faith That *Richard Roe* is justly indebted unto this deponent in 20*l.* for work and labour by this deponent done and performed for the said *Richard Roe*; and for materials found.

John Doe, of Milk-street, Cheap-side, London, ware- houseman, maketh oath and faith, That *Richard Roe* is justly indebted unto this deponent in 10*l.* and upwards, for goods sold and delivered.

John Doe, of, &c. maketh oath, and faith, That *Richard Roe* is justly indebted unto this deponent, in 100*l.* for money lent and advanced at his request.

For money by this deponent laid out, expended, and paid for the said *Richard Roe* at his request.

For money had and received to and for the use of this deponent.

Indebted unto this deponent in 100*l.* on an account stated.

For the work and labour by this deponent done for the said *Richard Roe*, and for materials found therein, and for goods sold and delivered to the said *Richard Roe* and also for money by this deponent laid out, expended, and paid, and for money lent and advanced, and also for money by the said *Richard Roe* had and received to the use of this deponent.

John Denn, of, &c. woollen draper, maketh oath and faith, That *Richard Fenn* is justly indebted to this deponent, and his partner *Richard Re*, in 100*l.* for goods sold and delivered.

The plaintiff's servant, if he knows of the debt being contracted, may (in the absence of the master) make affidavit of the debt being due to plaintiff, which will hold defendant to bail; then the affidavit will run thus:

Joseph Lamb, servant to Richard Fenn, of New-gate-street, London, leather-seller, maketh oath and faith, vant.

For goods sold and delivered, made by a servant.

saith, That *John Denn* is justly indebted to the said *Richard Feen*, in 40*l.* for goods sold and delivered, and for work done by the said *Richard Feen*.

If the work be done by a carpenter, coach-maker, or any other trade, wherein servants and carriages are employed, the affidavit may be thus (though in point of law all is supposed to be done by the master, and may be so laid in the declaration):

For work done
by the plaintiff
and his servants,
&c.

For the hire of
horses.

For work done
as a surgeon, and
for medicines.

For medicines
found as an apo-
thecary.

For depasturing
of cattle.

For the use and
occupation of a
house and land.

The like of a
messuage.

For part of a
messuage.

For work and labour done and performed by this deponent and his servants for the said *John Denn*.

For the hire of divers horses, mares, and geldings of this deponent, by him this deponent let to hire to the said *John Denn*, and at his request.

For the work and labour of this deponent as a surgeon, by him done and performed, in and about the healing and curing of the said *John Denn* of divers wounds, and also for divers medicines, potions, and plaisters, by this deponent found and provided for the said *John Denn*, at his request.

For divers medicines, and other things, found and provided, administered and applied, to the said *John Denn*, by this deponent as an apothecary, and also to his family at his request.

For feeding and depasturing of divers cattle of the said *John Denn*, at his request, for the space of six weeks, now elapsed.

For the use and occupation of a certain messuage, and divers acres of land, with the appurtenances, situate in the parish of *High Wycomb*, in the county of *Bucks*, for one year, now elapsed.

For the use and occupation of a certain messuage, with the appurtenances, situate in *Frith-street*, *Soho*, in the county of *Middlesex*, held by the said *John Denn* of this deponent, for the space of one year, now elapsed.

For the use and occupation of certain rooms and apartments, part and parcel of a certain messuage of this deponent, situate in *Fleet-street*, *London*, held and enjoyed by the said *John Denn*, for the space of half a year, now elapsed.

For

For certain arrears of rent, due and owing from the said *John Denn* to this deponent, for the use and occupation of a certain messuage or tenement, with the appurtenances, situate and being in the parish of *St. Bride's, Fleet-street, London*, demised by this deponent by indenture of lease to the said *John Denn*.

For arrears of rent due on a lease.

For a gelding sold and delivered by this deponent to the said *John Denn*, at his request.

For a gelding sold.

For meat, drink, washing, lodging, and other necessities, by this deponent found and provided for the said *John Denn*, and his family, at his request.

For meat, drink, washing, &c.

A. B. of, &c. maketh oath and saith, That *C. D.* is indebted unto this deponent in the sum of 20*l.* by virtue of a certain judgment by default recovered by him against the said *C. D.* as the administrator of *J. K.* deceased, in Hilary term last past; and to a writ of *fieri facias* upon which said judgment the sheriff hath returned *nulla bona* and a *devastavit* by the said *C. D.* of the effects of the said deceased, to the amount of the said 20*l.* Vide *Comb.* 206.

To hold an administrator to bail for a *devastavit* returned by the sheriff.

Notes of Hand.

John Denn, of *Burford*, in the county of *Oxford*, farmer, maketh oath and saith, That *Richard Fenn* is justly indebted unto this deponent in 50*l.* as the drawer of a promissory note, payable to this deponent or order, at a day now past (or on demand).

Drawee against the drawer.

On a promissory note, drawn by the said *Richard Fenn*, payable to one *A. B.* or order, and by him indorsed to this deponent.

Indorsee against drawer.

Is justly indebted unto this deponent in fifty pounds, as indorsee of a promissory note of hand, indorsed to this deponent, payable at a day now past.

Indorsee against the indorser.

Is

On a note, where
part has been
paid, drawn
against the
drawer.

Quaker's affirm-
ation.

Is justly indebted unto this deponent in 50*l.* upon a promissory note drawn by the said *Richard Penn*, payable to this deponent, or order, for 100*l.* at a day now past.

A. B. of *Ec.* (being one of the people called *Quakers*), solemnly affirms, That *C. D.* is justly indebted unto this affirmant in 20*l.* on a promissory note, drawn by the said *C. D.* payable to this affirmant, or order, at a day now past.

Bills of Exchange.

Drawee against
acceptor.

A. B. of *Ec.* grocer, maketh oath and saith, That *C. D.* is indebted to this deponent in 70*l.* as the acceptor of a bill of exchange, payable to this deponent or order, at a day now past.

Drawee against
drawer.

Maketh oath and saith, That *John Denn* is justly indebted to this deponent in 100*l.* as the drawer of a bill of exchange, payable to this deponent or order, at a day now past.

Indorsee against
the drawer, when
payable to his
own order.

Maketh oath and saith, That *C. D.* is justly indebted to the deponent in 70*l.* on a bill of exchange, drawn by one *G. H.* on *I. K.* payable to his own order, and by the said *G. H.* indorsed to this deponent, payable at a day now past.

Indorsee against
an indorser.

That *C. D.* is justly indebted to this deponent in 70*l.* on a bill of exchange, indorsed by the said *C. D.* to this deponent, and payable at a day now past.

Trover for
goods.

A. B. of, *Ec.* maketh oath and saith, That the defendant now hath, or lately had, in his possession divers goods and chattels of this deponent's, of the value of 100*l.* which he hath unlawfully converted to his own use.

Trover for a
promissory note.

That *C. D.* hath, in his possession, a certain promissory note of hand of this deponent's, bearing date the 5th day of *June* 1783, whereby one *A. B.* six weeks after the date thereof, promised to pay to this deponent, or order, 40*l.* for value received; and which said promissory note the said defendant hath unlawfully converted to his own use.

That

That *C. D.* hath in his possession, a certain bond or obligation of this deponent's, bearing date the 5th day of *January* 1783, entered into by one *J. K.* to this deponent, in the penal sum of 400*l.* conditioned for the payment of 200*l.* as therein mentioned; and which said bond the said defendant hath unlawfully converted to his own use.

The like for a bond.

An affidavit in trover, "*That the defendants have possessed themselves of divers goods belonging to the plaintiff of the value of 20*l.* and have refused to deliver them up; and that they or some of them have converted and disposed of them to their own use,*" is sufficient to hold to bail. *Cowp. Rep.* 529. *Charter v. Jacques.*

What affidavit is sufficient.

That *C. D.* hath, in his possession, divers deeds and writings of this deponent, of the value of 400*l.* and which deeds and writings the said defendant hath unlawfully converted to his own use.

The like for deeds generally.

That *C. D.* holds and unjustly detains from this deponent a certain indenture of lease, bearing date the 4th day of *January* 1783, made between *C. D.* of, &c. of the one part, and *A. B.* of, &c. of the other part, and which said indenture is of the value of 20*l.* and upwards to this deponent.

In detinue.

On Bond.

J. K. of, &c. hofier, maketh oath and faith, On a bond.

That *C. D.* is justly indebted unto this deponent in 100*l.* and upwards, for principal and interest due on a bond, bearing date the 4th day of *May* last past, entered into by the said defendant to this deponent, in the penal sum of 200*l.* conditioned for the payment of 100*l.* and lawful interest for the same.

J. D. of, &c. gentleman, maketh oath and faith, That *C. D.* did, by his bond, bearing date the 3d of *February* last past, become bound unto *A. B.* of, &c. mercer, in the penal sum of 200*l.* conditioned for the payment of 100*l.* and lawful interest, on a certain day now past, and which bond

On an assignment of a bond, made by the assignee.

is

is now in the custody of this deponent. And this deponent further saith, That the said *A. B.* did, by indenture, bearing date the day of last past, assign, transfer, and set over the said bond unto him this deponent, and all monies due and owing thereon, for a valuable consideration then paid by this deponent to the said *A. B.* And this deponent further saith, That he hath not received any part of the said 100*l.* or the interest thereof due on the said bond; nor hath the said *A. B.* to the knowledge or belief of this deponent, received the said 100*l.* or any part thereof, or the interest thereof, since the said assignment; and that the said *C. D.* is now justly indebted unto this deponent, as assignee as aforesaid, in the sum of 102*l.* 10*s.* for the principal and interest due upon the said bond. Some practisers think the obligee should join in this affidavit with the assignee; but I find in 1 *Wils.* 252. in *Loveland and Bassett, Trin. 16 Geo. 2.* where an assignee of a bond swore, that the obligor was indebted in 90*l.* for principal and interest upon the bond, as he believed, it was held sufficient to hold to special bail.—*Cur. said*—As the assignee had the bond in his own custody, it was of itself some evidence of the debt; and the presumption must be, that it was not paid, as the bond was not cancelled or given up to the obligor.

The like where
the obligee joins
with the assignee.

A. B. of, &c. and *C. D.* of, &c. severally make oath and say; and first, this deponent *A. B.* for himself saith, that *G. H.* did by his bond, bearing date the 3d day of *February* 1790, become held and bound unto this deponent in the penal sum of 200*l.* conditioned for the payment of the sum of 100*l.* together with lawful interest for the same, on a day now past. And this deponent further saith, that he did by indenture, bearing date the day of last past, assign the said bond, and all monies due thereon, for a valuable consideration paid to this deponent, unto the other deponent *C. D.* And this deponent hath not received the said 100*l.* or any part

part thereof, or the interest thereof, from the said *G. H.* either before or since the said assignment, And this deponent *C. D.* for himself saith, that the said *G. H.* is justly indebted unto this deponent, as assignee as aforesaid, in 105*l.* for the principal and interest due on the said bond.

A. B. of, &c. mercer, maketh oath and saith, Affidavit for money due on a judgment. That *C. D.* is justly and truly indebted unto this deponent in 30*l.* on and by virtue of a judgment recovered by this deponent in this honourable court, against the said defendant as of *Easter* term last past; and also in the further sum of 5*l.* for his costs taxed thereon.

A. B. of, &c. grocer, maketh oath and saith, On an annuity bond. That *C. D.* is indebted unto this deponent in pounds, for the arrear of a certain annuity due to this deponent, upon and by virtue of a bond, bearing date the day of 1789, entered into by the said defendant to this deponent, in the sum of pounds, conditioned for the payment of the sum of pounds a year, for the life of the said defendant, to this deponent.

A. B. of, &c. tallow-chandler, maketh oath and saith, By the assignee of a bankrupt. That *C. D.* is indebted unto this deponent and *J. M.* as assignees of the estate and effects of *J. K.* a bankrupt, in twenty pounds, as appears by an account under the bankrupt's hand, and delivered to this deponent, and which sum this deponent verily believes to be due from the said defendant to the estate of the said bankrupt.

If an assignee of a bankrupt and two others sue jointly, the *former* may hold the defendant to bail on an affidavit of the debt that defendant was indebted to plaintiffs for goods sold and delivered, as appears by the bankrupt's books, and as the deponent believed. The court observed, that the consequence of not allowing it to be good would be, to prevent the assignee arresting the defendant at all, unless the others would assist him. *4 Term Rep. 176. Swaine et al. v. Cramond.* One of 3 assignees may make affidavit to hold to bail.

J. K.

By an executor,
for goods sold
and delivered.

J. K. of, &c. grocer, executor of the last will and testament of *A. B.* deceased, maketh oath and saith, That the above defendant is justly indebted unto this deponent, as executor as aforesaid, in 5*l.* for goods sold and delivered by the said *A. B.* in his lifetime, as appears by the books of the said *A. B.* and which sum is now due from the said defendant to the estate of the said *A. B.* as this deponent verily believes.

Upon a note by
an executor.

Upon a promissory note given by the defendant to the said *A. B.* in his lifetime, as he believes, and as appears to this deponent by the note in his custody, and which said sum is now due to this deponent as executor as aforesaid, as he verily believes.

To hold to
bail for an
assault.

In order to hold a defendant to bail for an assault, an affidavit must be prepared, and laid before a judge, which is to be ingrossed on a treble 6*d.* stamp paper, and sworn before him; if he approves thereof, he will make an order to hold the defendant to bail, and it may be as follows:

Affidavit to hold
to bail for an
assault.

J. G. of, &c. the plaintiff, and *J. W.* of, &c. surgeon, severally make oath and say: And first this deponent *J. G.* for himself saith, That in the month of *January* last past, the above named *W. F.* made an assault upon this deponent, and did beat and kick this deponent in so violent a manner on his groin, and other parts of his body, that this deponent has ever since that time been in great pain; and this deponent has at this time a rupture in his right groin, descending into the *scrotum*, occasioned by the kicks and blows which this deponent received from the said *W. F.* whereby this deponent is rendered utterly incapable of getting his livelihood. And this deponent further saith, That, to the best of his knowledge, he never was subject to, nor had a rupture, before the said assault was made upon him this deponent as aforesaid; and that the said kicks and blows given him by the said defendant, are the sole cause of the said rupture. And this deponent further saith, That he has applied to several eminent surgeons for advice to be cured of the said rupture, but has been informed by them that the same is

is incurable. And this deponent further saith, That he knows and is well acquainted with the defendant, and that the said defendant is in very good circumstances. And this deponent further saith, That he believes the said *W. F.* soon intends leaving this kingdom, and has not made this deponent any satisfaction for the said assault. And this deponent *J. W.* saith, that he hath viewed the other deponent's right groin, and says, that he has got a rupture in his said right groin descending into the *scrotum*, which in this deponent's opinion is incurable, and renders him utterly incapable of following his business.

Maketh oath and saith, That *A. B.* fourth mate of the ship called *N. J. P.* commander, on the 1st day of *February* 1781, came to this deponent in the steerage of the said ship at *B.* in the *East-Indies*, and without any just cause or provocation whatsoever, given to or intended to be given to him, by this deponent, laid hold of this deponent's collar, and dragged this deponent on the floor thereof, and with his fist, did with great force and violence strike this deponent many blows on his head, face, and body, by which this deponent lay senseless for some time; and the said *A. B.* would have again beat this deponent, had he not been prevented by a person on board the said ship. And this deponent further saith, That his right cheek became greatly swollen and discoloured, and that he was in great pain for a considerable time afterwards; and this deponent was rendered wholly incapable of performing his business on board the said ship. And this deponent further saith, That the said *A. B.* hath not made any satisfaction for the said assault, although he is in good circumstances; and he believes that the said *A. B.* soon intends leaving this kingdom.

J. B. of *Sc.* maketh oath, That *C. D.* is justly indebted unto this deponent in 270*l.* being the value of one parcel of merchandize received by the said *C. D.* on board a ship or vessel called the *Swift*, whereof the said *C. D.* was commander; and for which the said *C. D.* as appears to this deponent,

Another.

For not delivering of goods pursuant to a bill of lading.

and as this deponent verily believes, signed or subscribed a bill of lading, bearing date the 16th day of *January* last, thereby undertaking to deliver to this deponent, or his assigns in *London*, the said parcel of merchandize, which the said *C. D.* hath not delivered, although the said ship hath long since arrived in the river of *Thames*.

On a bond made
in Scotland.

In the sum of 150*l.* on and by virtue of a certain instrument in writing, made according to the laws of the kingdom of *Scotland*, and there called a bond,

Against an underwriter on a policy.

In 90*l.* for an average loss on the said *C. D.*'s subscription of the sum of 100*l.* as an underwriter on this deponent's interest in goods shipped on his own proper account, in the ship *J. N. F.* late master, on her late voyage from *London* to *New York*, in the prosecution of which said voyage, the said vessel and the greatest part of her cargo were lost.

The COUNTIES of ENGLAND.

Bedfordshire	Lincolnshire
Berkshire	Middlesex
Buckinghamshire	Monmouthshire
Cambridgeshire	Norfolk
Cheshire, C. P.	Northamptonshire
Cornwall	Northumberland
Cumberland	Nottinghamshire
Derbyshire	Oxfordshire
Devonshire	Rutlandshire
Dorsetshire	Shropshire
Durham, C. P.	Somersetshire
Essex	Staffordshire
Gloucestershire	Suffolk
Hampshire	Surrey
Hertfordshire	Sussex
Herefordshire	Warwickshire
Huntingdonshire	Westmoreland
Kent	Wiltshire
Lancashire, C. P.	Worcestershire
Leicestershire	Yorkshire.

It appears that *Alfred the Great*, a Saxon King, was the first that divided *England* into counties, or shires.

They

They are subdivided into *Maritime* and *Inland*. There are 19 of the former; seven whereof are situate on the *German Sea*, six on the *Channel*, two at the *Severn's Mouth*, and four upon the *Irish Sea*, or *St. George's Channel*: Those on the *German Sea* are, *Northumberland*, *Durham*, *Yorkshire*, *Lincolnshire*, *Northfolk*, *Suffolk*, and *Essex*.

Those on the *Channel*, *Kent*, *Sussex*, *Hampshire*, *Dorsetshire*, *Devonshire*, and *Cornwall*.

Those at the *Severn's Mouth*, *Somersetshire*, and *Monmouthshire*.

Those in the *Irish Sea*, *Cheshire*, *Lancashire*, *Cumberland*, and *Westmoreland*.

The *Inland Counties* are 21 in number.

Bedford	Northampton
Berks	Nottingham
Bucks	Oxford
Cambridge	Rutland
Derby	Shropshire
Gloucester	Stafford
Hertford	Surrey
Hereford	Warwick
Huntingdon	Wiltshire
Leicester	and
Middlesex	Worcestershire

The counties of *Chester*, *Durham*, and *Lancaster*, are called *counties palatine*, and writs issued out of the superior courts of *Westminster*, are to be *specially* directed.

The *Principality of Wales* is divided into two parts, namely, *North* and *South*.

North-Wales contains,

Anglesea
Caernarvonshire
Denbighshire
Flintshire
Merionethshire
and
Montgomeryshire

South-Wales contains,

Brecknockshire
Cardiganshire
Carmarthenshire
Glamorganshire
Pembrokeshire
and
Radnorshire

The unit of *latitude* runs into *Wales*. *Perry v. Jones*. *Dougl. Rep.* 212. *Lloyd v. Jones*. *Ibid*.

Cinque Ports.

These are five havens that lie in the East part of England, towards France, thus called by way of eminence, on account of their superior importance; as having been thought by our kings to merit a particular regard for their preservation, against invasions. Hence they have a particular policy, and are governed by a keeper, with the title of *lord warden of the cinque ports*; which office belongs to the *Constable of Dover*: and their representatives are called, *barons of the cinque ports*. The five ports are, *Hastings, Romney, Hythe, Dover, and Sandwich*; to which *Winchelsea* and *Rye* have been since added.

To *Hastings* belong *Seaford, Pevensey, Hedney, Winchelsea, Rye, Hamine, Wakebourn, Creneth, and Forthcliffe*.

To *Romney* belongs, *Bromhall, Lyde, Oswardstone, Dangemare, and Romenhall*.

To *Hythe* belongs, *Westmeath*.

To *Dover* belongs, *Folkston, Feversham, and Marge*.

To *Sandwich* belongs, *Fordiwic, Reculver, Serre, and Deal*.

The writ of *latitat* runs there, and is directed to the *Constable of the Castle of Dover*, or to his deputy.

Process.

Process, what.

PROCESS is that by which a man is called into any temporal court, because it is the beginning or principal part, by which the rest is directed; or, if taken strictly, it is a proceeding after the original, before judgment. *Britton, 138. Crompt. of Courts, 183. 8 Rep. 137.* *Process* to call persons into court, &c. must be in the name of the king; and if it issue from the superior court, it ought to be under the *teste* of the *chief justice*, or of the *senior judge*.

judge of the court, if there be no *chief justice*, and if it issues from any other court, it is to be under the *teste* of the *first* in commission. *Dalt. ch. 132. Finch, 436. Cro. Car. 390.*

The writ of *latitat* must be made *returnable* on a day certain in term time, 1 *Str. 399.* as on *Monday* next after the *morrow* of *All Souls*; as also the bill of *Middlesex*; and need not have *fifteen days* between the *teste* and return; but may be sued out in term-time one-day, *returnable the next, Str. 917.* and it may be *tested* in *vacation*, before the cause of action accrued.

The *latitat* and bill of *Middlesex* when tested and *returnable*.

If the writ of *latitat* be sued out in *vacation*, then *teste* it the *last day* of the *preceding term.* 2 *Burr. 962.*

As the process is *de die in diem*, it cannot be made *returnable* on the day of suing it out. *Tidd's Pract. 93.*

Variance between the declaration and process, *i. e.* to answer plaintiff *qui tam pro dem. rege, quam pro seipso sequitur*, and the declaration in his own name only; omitting the *qui tam* part is fatal. *Canning v. Davis, 4 Burr. 2417.* and proceedings set aside. A bill of *Middlesex* was to answer to the weaver's company; and the declaration in the name of the company *qui tam* for themselves, and the poor, &c. the court held it right, it not being usual to insert in the bill of *Middlesex*, on what account or in what right the party sues, as in the case of executors and administrators, the case of an assignee of a bail bond, and the like, where the process is only *ad respondendum* to *A. B. Str. 1232. 3 Wils 141. 2 Black. Rep. 722.* where *Yates J.* said: Though the plaintiff may style himself executor, or give himself any other superfluous description in the process, and declare otherwise, yet this will not hurt; for the demand is still the same. And if plaintiff brings the defendant into court, this reason still holds good.

Variance between the declaration and process.

The writ of *latitat* is a kind of *original* in the king's bench, and it was holden to be a good commencement of the suit in a penal action. 2 *Lord Raym. 883. 2 Burr. 950. 3 Burr. 1243. Contra Carth. 233.*

Latitat considered as an original.

Proceedings by
bill.

It has been already said, that there are two ways of proceeding in this court, viz. by *original writ*, and by *bill*; therefore I shall proceed first to shew the proceeding by *bill*.

If the defendant lives in *Middlesex*, a precept is made out (called a *bill of Middlesex*), in order to arrest him (supposing the plaintiff's debt amounts to 10*l.* or upwards, and he makes affidavit of the cause of action), which is printed, and may be had at the stationers for 2*s.* 7*d.* But before such writ is signed, there must be a warrant to prosecute upon a 2*s.* 6*d.* stamp, filed with the proper officer who signs such writ, pursuant to the statute 25 *Geo.* 3. c. 80. under 5*l.* penalty, *sec.* 16. This warrant may also be had of the officer or stationers; the form of which will be as follows:

Warrant to pro-
secute.

In the court of king's bench.

Middlesex, } *Andrew Deering* is retained to
to wit, } prosecute by *John Doe* as his
attorney against *Richard Roe*.

No. on the } *Andrew Deering*, plaintiff's at-
file. } torney.

(If by an agent to the solicitor immediately re-
tained, add) by *G. H.* his agent.

Entered or filed of record this _____ day of _____

In the 31st year of king *Geo.* 3. (Officer's name.)

These latter words are wrote by the officer who
files the warrant.

If the defendant be arrested on a bill of *Middlesex*, out of that county, the proceedings will be set aside for irregularity, provided the application be made before the time to plead is out. And Mr. *J. Buller* said, a bill of *Middlesex* cannot run over all *England*. Such a practice would put an end to the writ of *latitat*; and if any notion has prevailed, that this sort of proceeding is regular, it ought to be contradicted. *Dougl. Rep.* 384. *Devenage v. Dalby*.

Bill of Middle-
sex cannot be
served in Lon-
don.

Rule to set aside the proceedings, it appearing that the defendant had been served with a bill of *Middlesex* in *London*. They contended, that as this was only for the purpose of bringing the defendant into

into court, it was immaterial in what place it was served; and that this court had refused in several instances to set aside the proceedings on this ground. Mr. J. Buller: The cases mentioned at the bar, are where a *latitat* has been served in the wrong county. There the writ is the same, and makes no difference whether served in the one or the other county. But there is no instance in which this court has not determined that the service of a bill of *Middlesex* is irregular, except where there has been some dispute about the limits of the city of London. *Borman v. Bellamy*, 1 Term Rep. 187.

If it be doubtful whether the place where defendant was served, is in London or *Middlesex*, the court will hold it to be good service: *Drew v. Marriott*, 1 Wils. 77.

The bill of *Middlesex* is only a precept and not a writ, having only a return and no *teste*, and if directed to the sheriff himself, it is ill, and will be set aside. 1 Black. Rep. 506.

Middlesex, } The sheriff is commanded to take Bill of Middlesex bailable.
to wit. } Richard Fenn, and John Doe, if

they may be found in his bailiwick, and safely keep them, so that he may have their bodies before the lord the king at *Westminster*, on Monday next after the morrow of *All Souls*, to answer John Brown in a plea of trespass, and also to a bill of the said John *Ac-ciam*.

Brown, to be exhibited against the said Richard Fenn, for 100*l*. upon promises, according to the custom of the court of the said lord the king, before the king himself; and that he have then there this precept.

By Bill. Stormont and Way.
J. K. Attorney. Oath for 56*l*.

Nov. 3, 1791.
Indorse the attorney's name and place of abode on the back, with the sum sworn to, and the day it is sued out.

Make a *præcipe* for the office thus: *Middlesex* (ss.) Bill for John Brown, against Richard *Præcipe*.

Richard Fenn, case for 100*l.* upon promises, returnable on *Monday* next after the morrow of *All Souls*.

Oath for 50*l.* *J. K.* attorney, *Nov. 3. 1791.*

N. B. Take the bill of *Middlesex*, affidavit, and *præcipe*, with the warrant to prosecute, to the bill of *Middlesex* office, No. 6, *Clifford's Inn*, pay for the oath 1*s.* signing the precept 6*d.* in term time, and 10*d.* in vacation; then get a warrant thereon at the sheriff's office, for which pay 4*d.*

If the defendant cannot be taken on the bill of *Middlesex*, make out an *alias*, and if not taken, issue a *pluries*, and so proceed with *pluries* until he be taken, if he lives in that county. But put a date on the *præcipes* when the first writ issued.

Alias.

Middlesex, } The sheriff is commanded, as before he was commanded, to take

Richard Fenn and *John Doe* (as in the other).

Pluries.

Middlesex, } The sheriff is commanded, as oftentimes he has been commanded,

to take (as in the other).

These writs are signed at the same office: make a *præcipe* as before, adding the word *alias* or *pluries* bill: pay signing 2*d.*

If in debt, &c.

In case the action should be in debt on bond, trover, detinue, covenant, assault, &c. then add one of the following *ac-etiams*:

Distinction as to bailable process, and other process.

And there is one distinction made in the filling up a bill of *Middlesex* and the writ of *latitat*, which is this: In the bill of *Middlesex*, the *ac-etiam* is, and also to a bill to be exhibited against the defendant according to the custom of the court of our lord the king before the king himself. In the *latitat* you say, according to the custom of our court before us.

Ac-etiam in debt on bond.

To answer *John Brown*, in a plea of trespass, and also to a bill of the said *John Brown*, to be exhibited against the said *Richard Fenn*, for 100*l.* debt, according, &c.

In

In a plea of trespass, and also to a bill of the said *In trover.*
John Brown, to be exhibited against the said *Richard Fenn*, for converting and disposing of the goods and chattels of the said *John Brown* to the value of fifty pounds, according, &c.

In a plea of trespass, and also to a bill of the said *Detinue.*
J. B. to be exhibited against the said *R. F.* for detaining the goods and chattels of the said *John Brown*, to the value of 500*l.* according, &c.

In a plea of trespass, and also to a bill of the said *Covenant.*
J. B. to be exhibited against the said *R. F.* for breach of covenant, to the damage of the said *J. B.* of 60*l.* according, &c.

In a plea of trespass, and also to a bill of the said *Assault.*
J. B. to be exhibited against the said *R. F.* for assaulting, beating, wounding, and evilly treating the said *J. B.* to the damage of the said *J. B.* of 500*l.* according, &c.

To answer *J. B.* in a plea of trespass, and also *If several de-*
to the several bills of the said *J. B.* to be exhibited *endants.*
against the said *T. P. E. F.* and *G. H.* for 100*l.*
severally upon promises, according, &c.

In a plea of trespass, and also to a bill of the said *For crim. con.*
J. B. to be exhibited against the said *R. F.* for as-
saulting and having criminal conversation with *E.*
the wife of the said *J. B.* to the said *J. B.* his da-
mage of 1000*l.* according, &c.

In a plea of trespass, and also to a bill of the said *At the suit of*
J. B. and *C. K.* as executors of the last will and *executors.*
testament of *W. C.* deceased, to be exhibited against
the said *R. F.* for 50*l.* upon promises, according,
&c.

In a plea of trespass, and also to a bill of the said *At the suit of an*
J. J. as administrator of all and singular the goods, *administrator.*
chattels, and credits, which were of *W. C.* who
died intestate, to be exhibited against the said *R. F.*
for 50*l.* upon promises, according, &c.

In a plea of trespass, and also to a bill of the said *At the suit of*
A. C. and *G. H.* as assignees of the estate and es- *assignees of a*
fects which were of *G. T.* a bankrupt according *bankrupt.*
to the form of the statutes, &c. to be exhibited against
the

the said *R. F.* for 100*l.* upon promises, according, &c.

For foreign money.

And also to a bill of the said *G.* for 400*l.* of lawful money of *Great Britain* in debt, being the value of 6000*l.* of gold and silver currency of the island of *Antigua* in the *West Indies*, to be exhibited, according, &c.

The court refused to set aside a bill of *Middlesex*, which was to answer the plaintiff in a plea of debt, instead of trespass. *Barber v. Lloyd*, 2 Term Rep. 513.

If in a liberty.

If the defendant lives in a liberty where the sheriff of *Middlesex* may not enter, make out a *non omittas* bill of *Middlesex*, whereupon the sheriff will grant his mandate to the high bailiff of *Westminster*, who makes a warrant thereon to his officer to arrest the defendant.

Non omittas.

Middlesex, } The sheriff is commanded that he
to wit. } omit not by reason of any liberty in his bailiwick, but that he enter the same, and take *Richard Fenn*, and *John Doe*, if they may be found in his bailiwick, and safely keep them, so that he may have their bodies before the lord the king at *Westminster*, on *Monday* next after the morrow of *All Souls*, to answer *John Fenn*, in a plea of trespass, and also to a bill of the said *John*, to be exhibited against the said *Richard*, for 50*l.* upon promises, according to the custom of the court of our lord the king, before the king himself, and that he have then there this precept.

By Bill.

Oath for 25*l.*

Stormont and Way.

J. K. attorney.

Nov. 3, 1791.

This is taken to the bill of *Middlesex* office as before, pay for signing the same as for the bill, make a *præcipe* as before, only add the words, "*non omittas*," bill of *Middlesex*.

Bill of *Middlesex* not bailable.

Middlesex, } The sheriff is commanded to take
to wit. } *John Brown* and *Richard Roe*, if they may be found in his bailiwick, and safely keep them, so that he may have their bodies before the lord

lord the king at *Westminster*, on *Monday* next after the morrow of *All Souls*, to answer *James Denn* in a plea of trespass, and that he then have there this precept.

By Bill.

Stormont and Way.

John Brown, You are served with this process, to the intent that you may by your attorney appear in his majesty's court of King's Bench at Westminster, at the return thereof, being the sixth day of November next, in order to your defence in this action.

Nov. 3, 1791.

J. K. Inner Temple.

Notice at the bottom of process, which was only to appear at the return thereof, being the 14th of June, without saying this instant, or expressing the year, exception to it, court said, it must be understood the next 14th of June, and held it right. *Weaver's Comp. v. Forrest*, 2 Str. 1233.

Notice on process need not express the year.

The defendant must be served with a copy of the process and notice personally, by stat. 12 G. I. c. 29. and service on the return-day, though after the court rises, is now good service. 2 Burr. 812. *Maud v. Bernard*.

If the writ be against several defendants, you must name them all in the notice; and copies are to be served on each defendant; and it is not necessary to shew the original at the time of service. Str. 877, unless demanded. *Cas. temp. Hardw.* 138.

In an action against husband and wife it is deemed sufficient to serve the husband only. The notice is to appear for himself and his wife.

If the defendant cannot be found in *Middlesex*, and is to be met with in *London*, or any other city or county, then get an office copy of the affidavit at the bill of *Middlesex* office (which will save a new one being made), pay for the same 1s. and 1s. 7d. for the stamp, which take to Mr. Webb's, and sue out a *latitat* thereon, which is the first writ that issues in the proceeding by bill in this court into any other county (except *Middlesex*), must be directed

If a warrant to prosecute has been once filed, there needs no other, but add that to the præcipe thus, "bill of *Middlesex*, sued out, day of 1791."

ed

ed to the proper sheriff, or sheriffs of the city, town, or county, where the defendant is to be arrested. But if a latitat is issued, not bailable, directed to the sheriff of Surrey, a copy may be served on the defendant in any other county, and the proceedings will not be set aside; *Term Rep.* 1 V. 187. ; because it is merely to compel an appearance.

Cities and Towns having a Sheriff or Sheriffs.

Cities of		Cities of	
<i>Bristol</i>	} Have two sheriffs.	<i>Canterbury</i>	} One sheriff.
<i>Coventry</i>		<i>Exeter</i>	
<i>Chester</i>		<i>Litchfield and</i>	
<i>York</i>		<i>Worcester</i>	
<i>Gloucester</i>			
<i>Lincoln</i>			
<i>London</i>			
<i>Norwich and</i>			
<i>Town of Nottingham</i>			
	</		

How to direct
the writ,

To our sheriffs of our
city of

Bristol
Coventry
Chester
York
Gloucester
Lincoln
London
Norwich

To our sheriffs of our
town and county of
Nottingham

To our sheriff of our
city of

Canterbury
Exeter
Litchfield
Worcester

To our sheriff of our
town and county of

Kingston upon Hull
Southampton
Poole
Newcastle upon Tyne

In other counties there can be no difficulty in directing the writ, as, To the sheriff of *Berkshire*, &c. unless it be a *habeas corpus* to remove a cause out

out of the inferior courts. For these directions, see title *Habeas Corpus*.

If the defendant lives in a county palatine, viz. *Chester, Lancaster, or Durham*; or within any of the *Cinque Ports*, viz. *Hastings, Romney, Hythe, Dover, or Sandwich*, then the *latias* must be directed as follows:

To the chamberlain of our county palatine of *Chester*, *Chester*.
or his deputy there, greeting, &c.

To the chancellor of our county palatine of *Lancaster*, *Lancaster*.
or his deputy there, greeting, &c.

To the reverend father in God by divine *Durham*.
permission, lord bishop of *Durham*, or to his chancellor
there, greeting, &c.

And instead of saying in the writs, "Our county palatine," say, "Your bishoprick."

If to the *Cinque Ports*, the direction is, "To the *Cinque ports*.
"constable of our castle of *Dover*, or to his deputy there,
"greeting," &c.

George the third by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, &c. To the sheriffs of *London*, greeting:
Whereas we lately commanded our sheriff of *Middlesex* that he should take *John Denn* and *Richard Roe*, if they might be found in his bailiwick, and safely keep them, so that he might have their bodies before us at *Westminster* at a certain day now past, to answer *Thomas Post*, in a plea of trespass^a; and also to a bill of the said *Thomas*, to be exhibited against the said *John*, for 100*l.* upon promises, according to the custom of our court before us, and our said sheriff of *Middlesex*, at that day returned to us, that the said *John* and *Richard* were not found in his bailiwick; whereupon on behalf of the aforesaid *Thomas*, it is sufficiently testified in our court before us, that the said *John* and *Richard* do lurk and secrete themselves in your county: therefore we command you, that you take them, if they be found in your bailiwick, and safely keep them, so that you have their bodies before us at *Westminster*, on *Monday* next after the morrow of *All Souls*,
to

A bailable *latias* to *London*, with *ac-etiam* in case.

^a N. B. The *ac-etiam* already done for the bill of *Middlesex* will suit this writ in substance.

ed to the proper sheriff, or sheriffs of the city, town, or county, where the defendant is to be arrested. But if a latitat is issued, not bailable, directed to the sheriff of Surrey, a copy may be served on the defendant in any other county, and the proceedings will not be set aside; *Term Rep. 1 V. 187.*; because it is merely to compel an appearance.

Cities and Towns having a Sheriff or Sheriffs.

Cities of		Cities of
<i>Bristol</i>	} Have two sheriffs.	<i>Canterbury</i>
<i>Coventry</i>		<i>Exeter</i>
<i>Chester</i>		<i>Litchfield and</i>
<i>York</i>		<i>Worcester</i>
<i>Gloucester</i>		} Towns of
<i>Lincoln</i>		<i>Kingston upon Hull</i>
<i>London</i>		<i>Southampton</i>
<i>Norwich and</i>		<i>Poole and</i>
<i>Town of Nottingham</i>		<i>Newcastle upon Tyne</i>
		} One sheriff.

How to direct
the writ.

To our sheriffs of our
city of

Bristol
Coventry
Chester
York
Gloucester
Lincoln
London
Norwich

To our sheriffs of our
town and county of
Nottingham

To our sheriff of our
city of

Canterbury
Exeter
Litchfield
Worcester

To our sheriff of our
town and county of

Kingston upon Hull
Southampton
Poole
Newcastle upon Tyne

In other counties there can be no difficulty in directing the writ, as, To the sheriff of *Berkshire*, &c. unless it be a *habeas corpus* to remove a cause

out

out of the inferior courts. For these directions, see title *Habeas Corpus*.

If the defendant lives in a county palatine, viz. *Chester, Lancaster, or Durham*; or within any of the *Cinque Ports*, viz. *Hastings, Romney, Hythe, Dover, or Sandwich*, then the *latias* must be directed as follows:

To the chamberlain of our county palatine of Chester, Chester.
or his deputy there, greeting, &c.

To the chancellor of our county palatine of Lancaster, Lancaster.
or his deputy there, greeting, &c.

To the reverend father in God by divine Durham.
permission, lord bishop of Durham, or to his chancellor
there, greeting, &c.

And instead of saying in the writs, "Our county palatine," say, "Your bishoprick."

If to the *Cinque Ports*, the direction is, "To the *Cinque ports*.
"constable of our castle of Dover, or to his deputy there,
"greeting," &c.

George the third by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, &c. To the sheriffs of London, greeting:
Whereas we lately commanded our sheriff of *Middlesex* that he should take *John Denn* and *Richard Roe*, if they might be found in his bailiwick, and safely keep them, so that he might have their bodies before us at *Westminster* at a certain day now past, to answer *Thomas Post*, in a plea of trespass; and also to a bill of the said *Thomas*, to be exhibited against the said *John*, for 100*l.* upon promises, according to the custom of our court before us, and our said sheriff of *Middlesex*, at that day returned to us, that the said *John* and *Richard* were not found in his bailiwick; whereupon on behalf of the aforesaid *Thomas*, it is sufficiently testified in our court before us, that the said *John* and *Richard* do lurk and secrete themselves in your county; therefore we command you, that you take them, if they be found in your bailiwick, and safely keep them, so that you have their bodies before us at *Westminster*, on Monday next after the morrow of *All Souls*,
to

A bailable *latias*
to London, with
ac-etiam in case.

N. B. The ac-etiam already done for the bill of *Middlesex* will suit this writ in substance.

to answer the said *Thomas* of the plea and bill afore-
said; and have you then there this writ. Witness
Lloyd lord *Kemyn* at *Westminster*, the 13th day of
July, in the 31st year of our reign.

Stormont and Way.

Indorse the attorney's name and abode, the sum
sworn to on the back, and the day of the month.

Præcipe.

London lat. for *Thomas Post* against *John Denn*
tr. ca. for 80*l.* upon promises, returnable on *Monday*
next after the morrow of *All Souls*.

Nov. 3, 1791.

J. F. attorney.

Oath for 50*l.*

Take affidavit, writ, *præcipe*, and warrant to
prosecute, to Messrs. *Provost* and *Webb*, King's Bench
office in the King's Bench Walks, who sign the same,
pay 2*s.* 6*d.* then to the seal office, No. 3, Inner
Temple Lane, pay 7*d.* when it is signed and sealed,
if defendant is to be arrested in *London*, go to No. 10,
Grocers Alley, get a warrant thereon, pay 4*d.* if in
Surrey, Essex, or Kent, pay 6*d.* any other county 2*s.* 6*d.*

N. B. Messrs. *Provost* and *Webb* sell these writs
already printed, or may be had at the stationers,
and the warrant to prosecute as before; they are
printed in the plural number, and it has been
customary to add, if only one defendant, *John Doe*
and *Richard Roe*, to save erasing the writ.

Alias.

If the defendant be not found in the first writ be-
fore the return, then issue an *alias*, which is called
an *alias capias* (the *testatum* part being left out), and
is signed and sealed as before.

Alias capias.

George, &c. to the sheriffs of *London* greeting:
We command you, as before we have commanded
you, that you take *John Denn* and *Richard Roe*, if
they may be found in your bailiwick, and safely
keep them, so that you may have their bodies before
us at *Westminster* on *Tuesday* next after the morrow
of *Saint Martin*, to answer to *Thomas Post* in a plea
of trespass; and also to a bill of the said *Thomas*
against the said *John* for 100*l.* upon promises, ac-
cording to the custom of our court before us to be
exhibited; and have there then this writ. Witness

Lloyd

Lloyd lord Kenyon at Westminster, the 7th day of November, in the 32d year of our reign.

Stormont and Way.

Indorse the attorney's name and sum sworn to. Make a *præcipe* as before, only say, "*alias capias*," instead of "*latitat*," and put the day the first writ issued.

If the defendant is not to be met with before the Pluries, return, sue out a *pluries capias*, which is like the *alias*, only instead of the words, "*as before we have commanded you*," add, "*as we have oftentimes commanded you*." Put the date of the first writ issued, in the *præcipe*.

If a term be omitted between the teste and return of mesne process, the cause is out of court. Therefore process ought to be continued from term to term; but upon writs of execution it is otherwise, as the cause is come to its end. 1 *Ld. Raym.* 775. 2 *Roll. Rep.* 442. 3 *Wils.* 341.

To answer to John Denn, who sues as well for our sovereign lord the king, as for himself in this behalf in a plea of debt; A plaintiff, *qui tam*, executor, administrator, &c. need not name himself so in the process (unless bail). *Str.* 1202.

If on a *qui tam* action.

To answer to John Denn, who sues as well for himself, as for the poor of the parish of A. in the county of B. in a plea of debt.

If the forfeiture be to the poor as well as the parish.

Upon general process, where the party is served with it, the plaintiff may declare *qui tam*, or as executor, &c. 2 *Str.* 1232. *Weavers' Comp. v. Forrest*, so as assignee on a bail bond, and the like where the process is only to answer A. B. *ibid.* *Vide* title Declaration.

If there be a liberty into which the sheriff cannot enter, then issue a *non omittas capias*, which gives command to the sheriff to disregard in general all liberties in the county, and enter the same, which writ is in this form:

George the third, by the grace of God, &c. to the sheriff of our county of Surrey, greeting: We command you, that you omit not by reason of

Non omittas capias.

any liberty in your county, but that you enter the same, and take *Richard Fenn* and *John Doe*, if they may be found in your bailiwick, and keep them safe, so that you may have their bodies before us at *Westminster*, on *Monday* next after the morrow of *All Souls*, to answer *John Denn* in a plea of trespass; and also to a bill of the said *John* to be exhibited against the said *Richard* for 40*l.* debt, according to the custom of our court before us; and have you there then this writ. Witness, &c.

This writ may issue in the first instance; make a *præcipe* as before, only say *Surrey non omittas capias* for, &c. pay signing 2*s.* 6*d.* seal 1*s.* 2*d.* get a warrant thereon as before.

This certainly is the best way to proceed where defendant is to be taken in a county, because if he lives in a *liberty*, the sheriff may arrest him forthwith, otherwise he must make his *mandate* to the bailiff of that liberty, having the return of writs.

If the sheriff enter, and arrest the defendant in a *liberty*, without a *non omittas*, the arrest is good, though the sheriff may be liable to an action. *Gill. C. P.* 27.

If the defendant lives in any of the counties palatine, as *Chester*, *Durham*, or *Lancaster*, then the writ runs thus:

Latitat to Ches-
ter.

George, &c. To our chamberlain of our county palatine of *Chester*, or to his deputy there, greeting: Whereas we lately commanded our sheriff of *Middlesex* that he should take *Richard Fenn* and *John Doe*, if they should be found in his bailiwick, and that he should keep them safely, so that he might have their bodies before us at *Westminster*, at a certain day now past, to answer *John Denn* in a plea of trespass; and also to a bill of the said *John* against the said *Richard*, for 100*l.* upon promises, according to the custom of our court before us to be exhibited; and our said sheriff at that day returned to us, that the said *Richard* and *John* were not found in his bailiwick; whereupon on the behalf of the said *John Denn* it is sufficiently attested in our court before

before us, that the said *Richard* and *John Doe* lurk and secrete themselves in your county palatine; therefore we command you, that by our writ under the seal of our said county palatine, to be duly made, and to be directed to the sheriff of our said county palatine, you command the said sheriff, that he take the said *Richard Fenn* and *John Doe*, if they may be found in his bailiwick, and keep them safely, so that he may have their bodies before us at *Westminster* on *Monday* next after the morrow of *All Souls*, to answer the said *John Denn* of the plea and bill aforesaid, and have there then this writ. Witness *Lloyd* lord *Kenyon* at *Westminster*, the 13th day of *July*, in the 31st year of our reign.

Stormont and Way.

Indorse the attorney's name, and the sum sworn to, then sign and seal it as before.

The *præcipe* for the office is as before, and warrant, only in the margin put "*County palatine of Chester Lat. for,*" &c.

George, &c. To the reverend father in God John, To the county by divine Providence, lord bishop of *Durham*, or to his palatine of deputy there, greeting (to the end of the recital of the bill of *Middlesex*): Therefore we command you, *Durham,* that by our writ, under the seal of your bishoprick, in due manner to be made and directed to the sheriff of the county of *Durham*, you cause the said sheriff to be commanded, that he take the said *Richard Fenn* and *John Doe*, if they may be found, &c.

To our chancellor of our county palatine of *Lancaster*, or to his deputy there, greeting (same as palatine of *Chester*). *Lancaster.*

If the defendant lives in any of the *Cinque Ports*, *Cinque Ports.* as *Hastings*, *Romney*, *Hythe*, *Dover*, or *Sandwich*, then your *latitat* is to be directed thus:

To the constable of our castle of *Dover*, or to his deputy there, greeting: Whereas we lately commanded (as in the *latitat* exactly); and instead of saying, "secrete themselves in your county," say, "in your bailiwick."

K

These

These *latitats* are to be had at the office, and, if attended to, the printed forms will serve in every case.

The arrest is made by the sheriff or his bailiff, by virtue of a mandate from the officer to whom the writ is directed.

Latitat runs into Durham.

It was contended by the bishop of *Durham*, that no process would run there but from the exchequer, and his officer refused to issue a mandate on a *latitat*; on motion for an attachment, this court declared, that they would never endure that the officer should refuse to receive their process, whatever might be the case, if it came properly before them upon a claim of *consuance*, or plea to the jurisdiction, and made the rule for an attachment against the officer absolute. *Cur.* The true meaning of the expression, *brave domini regis non currit*, is, that the court cannot write directly to the sheriff, as they do in other cases. *Chapman v. Maddison.* *Str.* 1089.

Also in Wales.

It was also held, that a *latitat* does run into *Wales*. *Perry v. Jones.* *Douglas*, 213.

A *latitat* may be served.

A *latitat* may be served in the counties palatine, without having a mandate. 2 *Barnard*, 318. 337. 398. *And.* 199.

Common Process.

Common process to be served personally.

If the cause of action does not require bail, or you mean to serve the defendant with process only, then the *stat.* 12 *Geo.* 1. c. 29. enacts, "That in all cases where the cause of action shall not amount to 10*l.* or upwards, in any superior court, the defendant shall not be arrested, but shall be served personally with a copy of the process." And by 5 *Geo.* 2. c. 27. s. 4. "That upon every copy of such process to be served, shall be written an *English notice* to such defendant, of the intent and meaning of such service, to the effect following: A. B. you are served with this process, to the intent that you may by your attorney appear in his majesty's court of King's Bench, at the return thereof, being the 6th day of November next, in order

Notice.

to your defence in this action." And for which notice no fee shall be demanded.

In the filling up process not bailable, three things are to be observed. 1. In the notice, the very day of the return must be inserted (and by original, though it happen to be on a Sunday). 2. The notice to appear must be directed to the defendant by the same name as the process, being particularly so expressed in the act of 5 Geo. 2. 3. That the name of the defendant must be inserted, as thus, "Mr. A. B. you are served," &c. otherwise the writ may be quashed on motion. 1 *Wilson*, 104. *Behema v. James*.

Service at any time on the return day is regular; and must not be served by a person who cannot read or write. *Maud v. Barnard*. 2 *Burr*. 812.

If it be against baron and feme, service on the husband is sufficient for both; and if the husband does not appear for himself and wife, plaintiff may enter an appearance for both. But it must express in the notice, to appear for yourself and Ann your wife.

If the action be joint, viz. against two or more persons, each must be served with a copy of the process.

George, &c. to the sheriff of Kent, greeting: A common la-
Whereas we lately commanded our sheriff of Middlesex, that he should take John Denn and Richard Roe, if they should be found in his bailiwick, and safely keep them, so that he might have their bodies before us at Westminster, at a certain day now past, to answer Thomas Post in a plea of trespass. And our said sheriff of Middlesex at that day returned to us, that the said John and Richard were not found in his bailiwick; whereupon, on the behalf of the said Thomas, it is sufficiently testified in our court before us, that the said John and Richard do lurk and secrete themselves in your county; Therefore we command you, that you take them, if they shall be found in your bailiwick, and them safely keep, so that you may have their bodies before us at Westminster, on Monday next after the morrow of All Souls, to answer the said Thomas of the plea aforesaid:

The word "trespass" may be used in all actions, where only the party is to be served.

aforesaid : and have you then there this writ. Witness *Lloyd lord Kenyon*, at *Westminster*, the 13th day of *July*, in the 31st year of our reign. *Stormont and Way*.

Notice.

Mr. John Denn, you are served with this process, to the intent that you may by your attorney appear in his majesty's court of King's Bench, at the return thereof, being the 7th day of November next, in order to your defence in this action.

Præcipe.

This writ is signed as before, and sealed. *N. B.* A *Præcipe* also must be made out for the office, thus : *Kent, Latitat for Thomas Post, against John Denn, Tr. returnable on Monday next after the morrow of All Souls. J. K. Attorney, 3d November, 1791.*

The alias in names must pursue the latitat. *Cerbett v. Bates, 3 Term Rep. 660.*

Indorse the name of the plaintiff's attorney, place of abode, and the day of the month, on the back. Then make an exact copy, or get a printed one at the stationer's, fill it up, and serve the defendant personally with it.

Special Bail.

Definition.

BAIL, *ballium* (from the *French bailler*, which comes from the *Greek βάλλειν*, and signifies to deliver into hands), is used in our common law for the freeing or setting at liberty one arrested or imprisoned upon any action, either *civil* or *criminal*, on surety taken for his appearance at a day and place certain. *Bract. b. 3. tract. 2. c. 8.*

The reason why called bail.

The reason why it is called bail, is because by this means the party restrained, is delivered into the hands of those that bind themselves for his forthcoming, in order to a safe keeping or protection from prison ; and the end of bail is, to satisfy the condemnation and costs, or render the defendant to prison.

Bail

Bail and mainprize are often used promiscuously in our law books as signifying one and the same thing, and agree in this notion, *that they save a man from imprisonment in the common gaol*, his friends undertaking for him before certain persons for that purpose authorized, that he shall appear at a certain day, and answer whatever shall be objected to him in a legal way. 2 *Haw. Pl. Cr. c. 88. 4 Inst. 180.* The chief difference is, that a man's *mainpernors* are barely his *sureties*, and cannot imprison him themselves to secure his appearance, *as his bail may*, who are looked upon as his gaolers, to whose custody he is committed, and therefore may take him upon a Sunday, confine him until the next day, and then render him. 6 *Mod. 231. Lord Raym. 706. 12 Mod. 275.*

Bail and mainprize, the difference.

Hale. P.C. 2. vol. 3

Special bail are two or more persons who undertake generally, or in a sum certain, that if the defendant be convicted, he shall satisfy the plaintiff, or render himself to the custody of the marshall. Generally there are but *two persons* who become bail for a defendant.

Special bail,

Where the defendant has been arrested or discharged out of custody, upon giving a bail-bond to the sheriff, at the return of the writ, he must, to discharge such bond, appear thereto, namely, by putting in *special bail*, or, as it is termed, *bail above*; so called, in contradistinction to the sheriff's bail, or *bail below*; nor can he render himself in discharge of such bond without *first putting in bail above*. 5 *Burr. 2683. Harrison v. Davies.*

How to proceed when bail put in to the sheriff.

This bail may be put in for the purpose of rendering the defendant (by his own desire) *previous* to the return of the writ.

It may be put in by the defendant's attorney, in consequence of his undertaking; or by the sheriff or his bail, for their own indemnity. 2 *Str. 876. Berchere v. Colson.*

By rule *M. 1654*, no attorney shall be bail for a defendant in any action; nor his clerk. *Bologne v. Langham, Cowp. Rep. 328. Vide Dougl. Rep. 466.*

No attorney's clerk shall be bail, nor himself.

But if a person, who by the rules of the court is not permitted to become bail, shall be put into the bail-piece, and not excepted to, the plaintiff cannot take an assignment of the bail-bond, and proceed upon it, as if no bail had been put in. *Ibid.*

No sheriff's officer, &c. shall be bail.

No sheriff's officer, bailiff, or other person concerned in the execution of process, shall be permitted to be bail in any action or suit depending in this court, nor persons outlawed after judgment. *R. M. 14 Geo. 2.* The keeper of the *Paultry Compter* was rejected. *Dougl. Rep. Hawkins v. Magnoll, 466.*

When to put in bail in London or Middlesex.

It is ordered by the court, that where any defendant shall be arrested by the sheriffs of London or Middlesex, by process issuing out of this court, and shall give to such sheriff a bail-bond for their appearance on the day of the return of such process, such defendant shall have leave for *four days after that return*, to put in good bail, at the suit of the plaintiff in such process; and within that time all proceedings upon the bail-bond to the sheriff shall stay. *R. M. 8 Ann.*

If the last of the four days happen on a Sunday.

The *four days* are reckoned in this court *exclusive*; and if the *last* of the *four days* happen on a Sunday, then the defendant has all *Monday* to put in his bail. *1 Str. 782. Stredley v. Sturt.*

How to put in special bail by bill.

The defendant having been arrested and put in bail to the sheriff, the first step to be taken to get rid of the bond is, to put in *bail above*; and, in order to do that, apply for a short copy of the writ, which may be had either at the office where the writ was signed, or at the sheriff's office, together with the *sum sworn to*, for that will be wanted in the future stage of the business. Then get a special bail-piece at the stationer's, pay for the same 2s. 1d. the name of the county is to be inserted the same as that in which the writ issued; and the bail are to be *two housekeepers*, who can justify in double the *sum sworn to*, after payment of *all their debts*.

Memorandum to be delivered on putting in special bail to the judge's clerk.

The act of 25 Geo. 3. c. 80. enacts, that every attorney, at the time of putting in bail, shall deposit

in the hands of the judge's clerk the memorandum of minute of his warrant to defend, stamped with a 2s. 6d. stamp, which the judge's clerk is to receive gratis; who is to deliver over the same to the proper officer. Sect. 25.

In an action against a husband and wife, if the husband and wife be taken, he shall remain in prison till bail given for both. 1 Salk. 115. 1 Roll. 583. Pract. Reg. 66. So if he is an attorney, and both are sued, he loses his privilege. Ibid. 580. l. 45. If both are taken, the wife shall be discharged. 1 Lev. 216.

A feme covert was discharged out of custody because she was arrested without her husband, though the writ was sued against both, and non est inventus returned as to the husband, 1 Term. Rep. 486. Edwards v. Rourke and wife: for a feme covert has no property of her own; and if it were permitted to arrest her, she might be imprisoned for life. Per Ashurst, J.

In the Court of King's Bench.

Middlesex, } J. K. is retained to defend by John The form of the
to wit. } Jones as his attorney, at the suit of warrant to de-
Joseph Sparks. fend.

Entered or filed of record, { J. K. defendant's at-
this day of in the } torney; (if by an
31st year of King Geo. 3d. } agent add) by M. his
agent.

Special bail-
piece.

Michaelmas, Term, in the 32d year
of the reign of king Geo. III.

Stormont and Way.

Middlesex, } John Jones is delivered to
to wit. } bail on a *cepi corpus*

to

John James, of Love-lane,
London, mercer,

and

Joseph Wadden, of Fleet-
street, London, hosier.

J. K. attorney, }
sworn to
£100.

At the suit of
Joseph Sparks.

11th Nov. 1791.

Take the bail, and bail-piece, to one of the
judge's chambers in *Serjeant's Inn, Chancery-Lane*,
and the clerk will take the recognizance as fol-
lows :

Recognizance by
bill.

" You do jointly and severally undertake that, if
" John Jones shall be condemned in this action, at the
" suit of Joseph Sparks, he shall satisfy the costs and
" condemnation money, or render himself to the custody
" of the marshal of the marshalsea, or you will do it
" for him.

" Are you content?"

Pay the clerk 4s. in term time, in vacation 5s.;
as soon as you have done this, give notice in writ-
ing of the bail being put in, to the plaintiff's attor-
ney, pursuant to the following rule :

Rule respecting
notice.

Every attorney of this court, who shall put in
any special bail before any justice of this court, *de*
bene esse, upon a *cepi corpus*, shall give notice thereof
without delay to the plaintiff or his attorney.
M. 16 Car. 2.

Joseph Sparks, plaintiff,
and

John Jones, defendant.

Notice of bail.

Take notice, that special bail was this day put
in

in for the defendant in this cause, before the Honourable Mr. justice *Butler*, at his chambers in *Serjeant's Inn, Chancery-lane, London*, and the names are, *John James, of Love-lane, London, merchant*, and *Joseph Wadden, of Fleet-street, London, hofier*, dated the 11th day of November 1791.

Yours, &c.

J. K. Attorney for the defendant, *Inner Temple*.

To Mr. G. H. Attorney for the plaintiff.

If they are the same as are bail to the Sheriff, then you add, "and they are the same as are bail to the Sheriff."

Of excepting to the Bail.

If the plaintiff be dissatisfied with the bail above, and they be not the same as are bail to the Sheriff, he must except against them within twenty days after notice given, otherwise such exception is void, pursuant to the following rule :

It is ordered that no exception to special bail put in before any justice of this court, shall be made for the future after twenty days notice given of such bail being put in, according to the course of this court; and exception after that time made, shall be void and of no force. *R. M. 8 Ann.*

Exception must be in writing entered in the judge's book, before whom the bail was taken; and the entry in the judge's book is thus, "I except against these bail." G. H. plaintiff's attorney. And the notice to the defendant's attorney will be, naming the cause, "I have excepted against the bail put in for the defendant in this cause."

Your's,

G. H. plaintiff's attorney."

To Mr. C. D. attorney for the defendant.

That every action in this court, where special bail is put in, and an exception entered against the said bail, and notice of such exception is given in writing to the defendant's attorney, the said defendant

Vacation.

ant shall procure his said bail to justify, if the notice be given in term time, in four days after such notice; but if such exception be entered in vacation time, and notice thereof be given in like manner, the bail put in, or other additional bail shall justify, upon the first day of the subsequent term. R. E. 5 G. 2.

Of justifying Bail.

After the plaintiff has entered his exception, and given notice thereof to the defendant, the bail (to discharge the bond) must personally appear in court within the time limited by the rules thereof, and justify themselves, and the plaintiff may oppose them by his counsel; if it appear they are insufficient, the court will reject them, and leave the plaintiff at liberty to proceed upon the bail-bond, or against the sheriff.

If the same bail are to justify, as have been put in, and notice given thereof, one day's notice is sufficient for the justification, and such notice may be given on Saturday for Monday; the form of such notice will be as follows:

Joseph Sparkes, plaintiff,
and
John Jones, defendant.

Notice of the
same bail justifying.

Take notice that the bail already put in for the defendant in this cause, and of whom you have had notice, will on Monday next justify themselves, in open court, Westminster-hall, in the county of Middlesex, as good bail for the said defendant: dated this 12th day of November 1791.

Yours, &c.

J. K. Attorney for the defendant.
To Mr. G. H. Attorney for the plaintiff.

N. B. The notice is now given for the justification "in open court, in Serjeant's Inn Hall, Chancery-lane."

Bail coming to justify and not being present at the sitting of the court, must wait until the rising.

If

If the bail do not justify at the day given (being the last day they have), they are out of court. Nor can they justify after the rule upon the sheriff to bring in the body is expired, without leave of the court. *Loft. 88.*

Of adding fresh Bail, and justifying.

If the bail already put in, do not mean to justify, then you may add *two more* to those already put in on the bail-piece, and give notice of justifying them; but such notice must be given *two days exclusive* of such justification; as for instance, *exception* is entered against the bail on the 12th of November; notice is given to justify the 16th, you must deliver such notice on the 14th. So that the notice is *exclusive* of one day, and *inclusive* the other: Monday for Wednesday is good; Saturday for Monday will not do for *added bail*, because Sunday is not reckoned as a day for this purpose, although it would do for bail *already put in*, and notice given: Friday for Monday is good.

Of adding fresh bail.

In the King's Bench.

Joseph Sparks, plaintiff,

Between and

John Jones, defendant.

Take notice, that Aaron Moses of Duke's-place, London, merchant, and George Duke, of Hatton-street near Holborn, in the county of Middlesex, broker, will, on Wednesday next, add themselves to the bail already put in for the defendant in this cause; and at the same time will justify themselves in open court, Westminster-hall, in the county of Middlesex, as good bail for the said defendant: dated the 14th day of November 1791.

Notice of adding and justifying.

Yours, &c.

J. K. Attorney for defendant.

To Mr. G. H. Attorney for plaintiff.

These may be added the same morning you justify in court; pay 2s. each name, *but mind and have the bail-piece in court to give the master*; therefore the

May be added in the treasury chamber,

the *preceding evening* get it of the *judge's clerk*, or he will attend with and deliver it to the master; pay him 2s. 6d.

May put in and
justify bail on
the same day.

You may put in bail, and justify at the same time by giving notice for that purpose two days exclusive previous thereto; which is done as follows, fill up a bail-piece, take it to the judge's clerk at Serjeant's Inn, who will take the recognizance, pay 4s. and 2s. 6d. for delivering it to the master in order to justify; have affidavit of service of notice ready, which give to counsel to move.

If you add only *one* person, to the bail already put in, and he with one of the other justifies, then your notice will be as follows:

Joseph Sparkes, plaintiff.

In the King's Bench.

and

John Jones, defendant.

Notice to add
one, and justify.

Take notice that *E. F.* of, &c. will on *Wednesday* next, add himself to the bail already put in for the defendant in this cause, and that he, together with *John James*, one of the bail already put in for the said defendant, and of whom you have had notice, will at the same time justify themselves in open court, *Westminster-hall*, in the county of *Middlesex*, as good bail for the said defendant: dated this 14th day of *November* 1791.

Your's, &c.

J. K. Attorney for defendant.

To Mr. *G. H.* Attorney for plaintiff.

How to justify.

How to justify bail in open court. In the evening bespeak bail-piece at the judge's chambers, and the clerk will deliver it to the master in court; pay 2s. 6d. get an affidavit of the service of such notice sworn, and on the back indorse the names of the plaintiff and defendant, with the counsel's name, "to move to justify the within bail," give it to counsel with 10s. 6d. and he will move it; take your bail in court to the master; the officer swears them, and the master asks if they are worth double the sum sworn

to after the payment of all their just debts, for which pay the officer 9s.; in the evening go to the clerk of the rules in *Portugal-street*, and he will draw up the rule for the allowance of the bail; pay 4s. serve copy on plaintiff's attorney.

In the King's Bench.

Between *Joseph Sparkes*, plaintiff,
and
John Jones, defendant.

J. C. clerk to *E. H.* of, &c. attorney for the defendant in this cause, maketh oath and faith, That he did on the 14th day of *November* instant, personally serve *J. K.* the plaintiff's attorney, with a true copy of the notice hereunto annexed.

Affidavit of service of notice.

If you serve the servant of plaintiff's attorney or clerk, say, "Served Mr. J. K. the plaintiff's attorney in this cause, with a true copy of the notice hereto annexed, by delivering the same to the clerk or servant of the said J. K. at his house in Serjeant's Inn, Fleet-street."

In order to save this trouble and expence, where the attorney certifies the bail are good to plaintiff's attorney, and he can rely on his word, this mode of justification is dispensed with; and the bail are taken to a judge's chambers by consent; pay 2s.; attorney 10s. 6d.

Plaintiff's attorney may consent.

Bail put in by one attorney for the defendant, and notice of justification given by a new attorney, not allowed by the court; the bail shall not be permitted to justify.

Bail put in by one attorney, and notice to justify by another, not good.

The master certified, that by the established practice, a party cannot change his attorney without leave of the court or a judge's order. *Dougl. Rep.* 217. *Macpherson v. Robinson.*

If one person be excepted to as bail, and another added, the name of the former may, with leave of the court, be struck out of the bail-piece at any time before *scire facias*. *Sayer's Rep.* 58. And proceedings as to him may be staid after *scire facias* brought, *ibid.* 309. till then he is not exonerated, *1 Blackf. Rep.* 462.

If one be excepted to and another added.

A notice

A notice that *A. B.* or two of them will justify, is bad. *Loft.* 26. The parish has been held too wide a designation, the *street* ought to be mentioned. *Loft.* 72. 194.

Landed property in Jamaica does not qualify to justify.

Mr. John Calendar, a merchant, came to justify as bail, the sum he was required to justify in was 9000*l.* and he regularly justified in that sum *inclusive* of his landed property in *Jamaica*. He was objected to the including his landed property in *Jamaica*. The court thought the objection a good one; because his landed property in *Jamaica* is not liable to the process of this court. *Boddy v. Leyland.* 4 *Burr.* 2526.

Of opposing the Bail.

Opposing bail, on what grounds they will be rejected, or not.

Generally, bail are opposed on *five* grounds with effect: *First*, that there is some mistake in the notice to justify; namely, that it should have been given *two days* previous, instead of one; *secondly*, that the bail have assumed *names* that are either *feigned*, or *belong to other persons*, for the punishment of such bail. *Vide* 21 *Jac.* 1. c. 26. s. 2. 4 & 5 *W. & M.* c. 4. s. 4. 1 *Str.* 384. But the court will not vacate the proceedings against the party personated, until the offender be convicted; 1 *Vent.* 301. nor can a conviction take place, until the bail-piece be filed. 2 *Sid.* 90. A *third* ground of opposing bail is, that they are not *house-keepers*: if they be, the rent paid is immaterial, though under 10*l.* *Loft.* 148.; nor is it necessary they should have been assessed to the poor's rate, *ibid.* 328. *Fourthly*, they may be opposed on the ground of their not being worth *double the sum sworn to*, after payment of all their *debts*. Under this head may be ranked *bankrupts*, who have not obtained their certificates; or such as have been *twice bankrupts*, and not paid 15*s.* in the pound. *Mountain v. Wilkins*, *M.* 24 *Geo.* 3. *Lastly*, after the expiration of the rule to bring in the body. *Loft.* 438. *Highway v. Tyers.* *M.* 20 *Geo.* 3.

Of

Of putting in Bail in the Country, and transmitting it.

By 4 & 5 W. & M. c. 4. The chief justice, &c. of the different courts, and chief baron, shall or may, by one or more commission, from time to time empower such and so many persons, other than common attornies and solicitors, as they shall think fit and necessary in all and every the usual shires and counties, to take and receive recognizance of bail, as any person or persons shall be willing or desirous to acknowledge in any action or suit depending in the said courts, in such manner and form, and by such recognizance or bail-piece, as the justices and barons have used to take the same; which shall be transmitted to the court where such action shall be depending, who upon affidavit made of the due taking thereof, by some credible person at the taking thereof, such justice or baron shall receive the same.

The chief justice, &c. may empower persons to take bail.

Sett. 2. Power is given to the justices and barons to make rules for justifying such bail by affidavit, *duly taken before the said commissioners*, who are hereby empowered and required to take same, and also to examine the sureties upon oath, touching the value of their respective estates. The third clause empowers justices of assize in their circuit, to take such bail in a similar manner; the 4th and last section makes it felony, for one to bail in another's name.

And may make rules for justifying by affidavit.

In case of arrest of any defendant in any county of this kingdom (except London or Middlesex), by process issuing out of this court, such defendant shall have leave for *six days* to put in good bail, after the return of such process, without any prosecution whatsoever to be made in the mean time on the bail-bond to the sheriff. R. M. 8 Ann.

Six days to put in bail in the country.

Notwithstanding the rule 8 W. 3. the bail-piece must *actually be filed with one of the judges, on the 6th day after the return of the writ*, or the bond may be assigned, pursuant to the stat. 4 & 5 Ann. c. 19. and notice given, if the proceedings be by bill.

How

How to put in Bail before a Commissioner.

How to put in
the bail.

Fill up the bail-piece as before, take it with bail to a commissioner of the court, he will take the recognizance, for which you pay 6s.; and it is usual to have an affidavit ingrossed on treble 6d. paper of the due taking the bail before such commissioner, to which is annexed the bail-piece, and sworn before a commissioner for taking affidavits, but not the person authorized to take such bail.

Peter Rix, plaintiff,
and

In the King's Bench.

John Doe, defendant.

Affidavit of due
taking bail in
the country to be
sworn before a
commissioner,
not the person
authorized to
take the bail.

Thomas Jones, of Newport, in the county of Bucks, gentleman, maketh oath and saith, That the recognizance of the bail or bail-piece hereunto annexed, was duly acknowledged by John Brown of Newport aforesaid, grocer, and James Rogers of the same place, farmer, before E. F. Esquire, the commissioner, who took the same in this deponent's presence the day of last past.

Sworn, &c.

T. J.

Also it is usual for the attorney in the country to send to his agent at the same time an affidavit of justification.

Peter Rix, plaintiff,
and

In the King's Bench.

John Doe, defendant.

Affidavit of
justification.
N. B. May be
sworn before the
commissioner
appointed to
take bail, but
not before the
commissioner
before whom the
affidavit of the
due taking the
bail was sworn.

John Brown of Newport in the county of Bucks, grocer, and James Rogers of the same place, farmer, bail for the defendant in this cause, severally make oath and say, and first, this deponent John Brown, for himself saith, That he is a housekeeper in Newport aforesaid, and that he this deponent is worth two hundred pounds over and above what will pay all his debts: And this deponent James Rogers for himself saith, That he is a housekeeper at Newport aforesaid, and is worth two hundred pounds, over and above what will pay all his debts.

On receipt of which, the agent files the bail-piece, with the warrant or memorandum to defend,

as before mentioned in stat. 25 Geo. 3. c. 80. and the affidavit of the due taking thereof with one of the judges of the court, for which he pays 5s. in term, and 1 s. more in vacation, and gives notice to plaintiff's agent, and at the same time he usually sends a copy of the affidavit of justification.

Peter Rix, plaintiff,
In the King's Bench. and
John Doe, defendant.

Take notice, that the bail-piece in this cause, with the affidavit of the due taking thereof, was this day filed with the Right Honourable *Lloyd Lord Kenyon*, at his chambers in *Serjeant's Inn, Chancery lane, London*. Dated the 12th Day of November 1791.

Your's, &c

T. S. Agent for defendant,

To Mr. *R. C.* agent for the plaintiff.

N. B. Some practisers add the names to the notice of the bail, it may be done either way.

Of Exception and Justification.

The plaintiff's attorney may except against them the same as in *London and Middlesex*, within twenty days, and notice must be given of justification as before, only add the words, "*by affidavit*." Affidavit also is to be made of the service of notice, and counsel is to move; take affidavit and bail-piece into court if not filed; if it is, bespeak it of the judge's clerk, pay 2s. 6d.; then give a brief to counsel to move to justify, and the clerk of the papers reads it, for which you pay 9s. to the officers of the court, rule for allowance 4s.; amongst agents this is seldom done, and indeed where there are fair practisers, there is little trouble given.

In town and country causes, when the bail is completed, the bail-piece must be filed within twenty days after, by the attorney who puts it in, under the penalty of 40s. *Trin. 13 Car. 2.* If the bail is justified in court, you apply to the master's clerk

Notice of such bail and affidavit being filed with the judge.

Exception, and notice of justification.

Within what time bail-piece to be filed.

for the bail-piece; if justified at chambers, get it at the judge's chambers, pay the clerk 1 s. and file it with Mr. Webb, pay 4 d.

If the same Bail to the Sheriff become Bail above.

How to proceed if the bail to the sheriff become bail above, to compel them to justify.

If the same persons that are bail to the sheriff, become bail above, and the plaintiff conceiving them to be *insufficient*, is desirous of a justification, *he must enter his exception*, and give notice as before directed, that the defendant may justify if he thinks fit, and serve the sheriff with a rule to return the writ (if this be not done previous, and which always may be done on the *return day of the writ*). If it be already done, and the sheriff has returned *cepi corpus*, then he may serve the sheriff with a *rule to bring in the body*: But if the defendant neglect to justify his bail, on the *day the rule expires*, the plaintiff may the next day move for an attachment against the sheriff for his contempt, in not obeying the last rule. And so it will be if he does not obey the first rule. *Vide title Proceeding against the sheriff in this case, p. 155.*

Bail justifying after rule to bring in the body too late.

Rule to bring in the body expired the 21st Nov. 1785. No bail put in till Saturday the 19th. Notice of such bail, and to justify, was given for the 21st, being *Monday*. Defendant on the *Monday* came with his bail, and the *notice being deficient* (*Sunday being held as no day*), defendant prayed time for *two days*, which was granted; fresh notice was given for the *Wednesday*. Bail came to justify, and were opposed by Mr. Baldwin, who alledged the rule to bring in the body expired on the *Monday preceding*, and that the *two days granted by the rule was a surprize on the court*. Mr. J. Buller: The first notice was short, and the rule to bring in the body expiring on the *Monday*, the court ought not to have granted the rule, for *Sunday is no day*. But if it had been for *bail already put in*, notice on *Saturday* to justify *Monday* would have been good. Therefore court refused to let the bail justify. *Overton's bail. Mich. T. 26 Geo. 3.*

Every bail taken before or upon the continuance-day, is a bail, and to be filed of the preceding term; and every bail taken after the continuance-day, is a bail, and to be filed of the subsequent-term, and not otherwise; but where new bail are added to the other bail taken on or before the continuance-day, in such case new bail shall be taken and filed as of that term in which the bail was first put in. *R. E. 5 Geo. 2. E. 11 W. 3. 1 Salk. 100.*

If no exception to bail is made within a proper time, the defendant may make affidavit of the service of notice, that such bail was put in, upon the back of the bail-piece (for which oath no fee is to be taken), and file the same with the master. *M. 16 Car. 2.*

One of the bail who had been excepted to, and consequently had not justified, moved for an exoneretur to be entered *nunc pro tunc*, not having had his name struck out of the bail-piece, this was after 2 *sci. fa.*'s returned. *Per Cur.* On payment of costs, let an exoneretur be entered, *nunc pro tunc.* *Humphry v. Leite, 4 Burr. 2107.*

It is said by a learned author, that where a defendant is in custody of the sheriff or marshal in a long vacation, such bail must justify themselves in open court, before the defendant is entitled to his discharge, so that if the plaintiff will not consent to a justification at chambers, the defendant must lie in prison till the next term. The practice is not so in this court, for he may justify for this purpose on the usual notice, before a judge at his chambers, and the plaintiff may oppose the bail. A great benefit to prisoners.

Bail-Bond.

Of the Proceedings on the Bail-Bond.

IF bail above be not duly put in, or when excepted to, they do not justify in due time, the bond is forfeited; and the plaintiff may either take an assign-

assignment of it, or proceed against the sheriff for not bringing in the body, at his election.

If he rules the sheriff to bring in the body, he cannot proceed to assign the bond, because he has made his election to proceed against the sheriff; but contrary if he only rules to return the writ.

In *London or Middlesex* no bail-bond can be put in suit, until *four days after the return of the writ*. *R. M. 8 Ann.*

If the arrest be in any other county or city, then not till *six days after the return of the writ*. *Ibid.*

The days reckoned.

A *latitat* was returnable on *Wednesday*, and, on debate, held that the bond could not be assigned until after *Monday*; for the *four days* are to be one *inclusive* and the other *exclusive*; and where the *fourth day* is *Sunday*, the party has all the *next day* to put in bail. *2 Str. 914. Ibid. 782. Bullock v. Lincoln.*

If the plaintiff has accepted an assignment of the bail-bond, the court will not grant him a rule upon the sheriff to return the writ. *1 Wilson 223. Ladbrooke v. Stone.*

Sheriff, at the request of plaintiff, to assign the bail-bond.

By *stat. 4 & 5 Ann. c. 16. s. 20.* it is enacted, that the sheriff, at the request and costs of the plaintiff, or his lawful attorney, shall assign to the plaintiff the bail-bond, by indorsing the same, and attesting it under his hand and seal in the presence of two or more credible witnesses; which may be done without any stamp, provided the assignment so indorsed be duly stamped before any action brought thereon; and, if forfeited, the plaintiff may, after such assignment, bring an action thereupon in his own name, and the court may give such relief to the plaintiff and defendant in the original action, and to the bail on the said bond, as shall be agreeable to justice and reason; and each rule of court shall have the effect of a defeazance to such bail-bond.

If the plaintiff die before the taking of assignment of the bond, proceedings thereon will be set aside. *Hutchinson v. Smith, 7 Mod. 240.*

Before

Before taking an assignment of the bond, the plaintiff's attorney should be satisfied, that the bail taken by the sheriff is good; for by accepting of such assignment, he cannot resort to the sheriff, unless by action at law, which is too hazardous to bring for such insufficiency.

Before taking the bond, the plaintiff's attorney ought to be satisfied with the bail.

If the bail are not put in, or if excepted against, and do not justify in due time, the plaintiff's attorney (if the writ be in *Middlesex*) may apply to the sheriff's office in *Took's Court, Curfitor-street*, if in *London*, to the *secondary's office*, for the assignment of the bond, and, on payment of 5s., the under-sheriff assigns the same. But if the writ be in the *country*, then he must apply to the under-sheriff there, who sends the same to his agent; the usual charge is 6s. 8d.

Assignment of the bond.

Of the Action on the Bond.

Before you sue out the writ on the bond, get the assignment stamped with a double 6d. pursuant to 4 and 5 *Ann. c. 16. s. 20.* the bail or principal cannot be arrested. *N. B.* The plaintiff is named assignee to the sheriff, and the action must be brought in the same court wherein the original writ was sued out; for that court only hath jurisdiction and cognizance of the action, 3 *Burr. 1923. Walton, ass. v. Bent, 1 Burr. 642.* otherwise the parties could not have the relief intended by the statute. Proceed exactly the same as in common cases, and you may lay the venue in any county. *Str. 727. 2 Ld. Ray. 1455.*

Action on the bond.

If an attorney be in the bond, the action must be brought in the same court where the process was issued; for by his entering into such bond, he waives his privilege, whether sued jointly or severally. *Barnes 117.*

If an attorney in the bond.

When the Bond is to stand as a Security.

In case the defendant by neglect has suffered the plaintiff to take an assignment of the bond, and he

has lost a trial; if he would wish to try the cause, he must move the court for that purpose on a special affidavit containing merits, if it be in term time; if in vacation, he may apply and obtain a judge's order, which will be granted, upon putting in and perfecting bail, paying the costs incurred, receiving a declaration in the original action, pleading issuably, and taking short notice of trial, so as not to delay the plaintiff, and consenting that the bond stand as a security. But this court has not yet said, that the plaintiff shall take judgment on the actions upon the bond, although the practice in the common pleas is so.

N. B. I do not see why this may not be done by summons in term time, as well as the vacation.

When the bond shall stand as security, although no proceeding in the original action for two terms.

Writ was returnable in *Easter term*, bail-bond taken, and no proceedings thereon till *October 24*, when the bond was assigned, and special bail was put in the next day. It was insisted that plaintiff ought to have delivered a declaration *de bene esse*, and thereby quickened defendant. But the court held he was not bound so to do, and that defendant was in the first fault, whereby plaintiff lost a trial; so defendant was forced to let the bail-bond stand as a security. *Str. 1262. Merryman v. Carpenter.*

The plaintiff had proved his debt under a commission, as bail was not put in pursuant to the condition of the bond, the plaintiff taking the assignment (although two terms had elapsed), was held good.

The defendant was on 18th *July 1783* arrested on a bill of *Middlesex*, and returnable on *Thursday* next after the morrow of *All Souls*, and gave bond; he became a bankrupt before the return of the writ, and the plaintiff 12th of *August* proved his debt: the defendant did not put in bail above, as he ought, four days after the return, nor did the plaintiff proceed by filing a declaration: the defendant not having obtained his certificate, plaintiff, 30th *April 1784*, took an assignment of the bond, sued out and served writ thereon, and declared 1st *May*. Defendant laid these facts before the court, and moved to set aside the proceedings; upon shewing cause, it was allowed, that the case in 2 *Str. 1262.* was in point: and on the part of the defendant, it was contended that the plaintiff not having delivered a declaration

within

within two terms, he was out of court, and therefore ought not to take the bond; and that his having proved his debt under the commission, he had waived all proceedings. But the court held, that nothing was a performance of the bond, but putting in bail above, and discharged the rule. *Carmichael v. Chandler.* 5 Burr. 2683. What performance of the bond.

Motion to stay proceedings on the bail-bond on payment of costs, and the sum sworn to *E. T.* 1774, it appeared by the plaintiff's affidavit, that he might have proceeded to trial the sittings after last Hilary term, that defendant did not die until after that time. *Cur.* held the practice to be, that where the plaintiff might have had judgment against the original defendant, the bail below are liable for the whole debt and costs, and here he might have had such judgment. Rule discharged. *Orton, & al. assignees, v. Vincent, et al. bail of Bedford.* Cowp. Rep. 71. Where plaintiff might have had judgment against the principal bail, are liable though he die, on the bond.

But where the defendant dies before the plaintiff could have had judgment against him, if there has been no delay, in putting in and perfecting bail, the court will relieve the bail on payment of costs only. *Ibid.*

There are no proceedings in the original action, after the assignment of the bail-bond.

If writ be returnable at a day out of term, the bail-bond taken on it is void, and that without plea. *Str.* 399. *Mills v. Bond.* Therefore may be set aside on motion. When bond is void.

The bail to the sheriff may, at the return of the writ, put in bail before a judge (against the defendant's consent) in order to perform the condition of the bail-bond; and may take up the defendant, and surrender him in discharge thereof. *Str.* 876. *Berschere v. Colson.* Bail to the sheriff may put in bail, and may render defendant.

Terms on which the Court will stay Proceedings on the Bond where no Trial is lost.

Immediately on the bail being served with process, take out a summons for the stay of proceedings

ings against them, upon payment of costs, and such summons must be *intituled in the original action*; give notice of putting in and justifying the bail at same time two days *exclusive* of the day given, which will save time, and the judge will make an order to stay the proceedings, "*upon perfecting bail in the original action, pleading issuably, and taking short notice of trial, for the sitting in term, and paying costs to be taxed by the master, which pay, as it is conditional and lies on defendant to perform; therefore the first step to be taken is, to get the master's appointment thereon to tax same, and serve plaintiff's attorney with a copy.*"

If the Bond be assigned irregularly, how to proceed.

How to proceed if irregularly assigned.

If the bond be irregularly signed, move the court to set the proceedings aside for irregularity, upon an affidavit, stating the particular facts, "*the writ having issued returnable on, &c. defendant's arrest, bail being put in above on such a day, and notice given, that the bail were served with writs returnable, &c. and that the bond was assigned such a day.*"

Cannot plead in abatement.

If the court stay the proceedings on the bond, the defendant is not at liberty to plead in *abatement*, but in *chief*. *Salk. 519.* Nor will the court order the bond to be delivered up to be cancelled, on the ground of a *misnomer*. *3 Term Rep. 572. Salter, qui tam, v. Shergold.*

If a rule be made to stay proceedings, cannot proceed in mean time.

Pending a rule to set aside proceedings for irregularity, and to stay the proceedings, plaintiff took an assignment of the bond in the mean time. Court agreed that the proceedings were totally *suspended* by an act of the court, and made the rule absolute to set aside the assignment of the bond, as having been made *too soon*. *Swaine v. Cramond. 4 Term Rep. 176.*

What is not a waiver of the assignment.

Where the defendant has not put in bail in time, whereby the bail-bond becomes forfeited, and afterwards gives notice that he will put them in, in order

order to stay proceedings on the bail-bond, the plaintiff may except to such bail, and it will not be a waiver of the assignment. *Cowp. Rep. 769. Boldero v. Gray.*

After regular bail put in, if the plaintiff except to them, it is a waiver of the proceedings on the bail-bond. Allowed by the master to be the universal practice. *Ibid.*

The court made a rule that in future, wherever the defendant is guilty of a neglect in not putting in bail in due time, by which the bail-bond becomes forfeited, the notice (in case the party means to put in bail in order to stay proceedings upon the bail-bond) should be, that he will put in and perfect bail on such a day: analogous to the case where the sheriff is ruled, who before he can discharge himself, must give notice that he will put in and perfect bail; and in that case plaintiff may oppose, without its being a waiver. *Ibid.*

Plaintiff may oppose bail, though bond forfeited, and no waiver.

Of the Proceeding against the Sheriff to compel him to return the Writ, and bring in the Body.

IT appears by the 13 *Edw. 1. c. 39. & 23 H. 6. c. 10.* that sheriffs of the different counties were very tardy in returning their writs in due time; and by the former statute it is ordained, "that a complaint should be made to the justices, and a writ should go unto them to inquire, whether such writ was executed or not; and if executed, and not returned, the demandant should have his damages awarded."

By the latter, "if sheriffs return upon any person, cepi corpus, or reddidit se, they shall have the bodies at the return of the said writs."

By rule, *Easter, 6 Jac. 1.* "Every sheriff shall, after term, return into court all writs, and in default expect judgment for contempt."

I

Notwith-

Notwithstanding which, sheriffs, bailiffs of liberties, and their deputies, delayed execution of process, and return thereof; for preventing of which, a rule was made in *Mich.* term, 1654, whereby the court ordered, "if it should appear that any such officer should wilfully delay the execution or return of process, or execution, or having levied money, should detain it after the return, besides the ordinary course of amerciements, &c. an attachment, &c. should be as the case requires."

Not liable after six months to return writ.

By 20 Geo. 2. c. 37. s. 2. "No sheriff shall be liable to be called upon to make a return of any writ, or process, unless he be required so to do within six months after the expiration of his office." Upon which statute it hath been holden, that the months are lunar months, or twenty-eight days; that the day of the sheriff's quitting his office is to be reckoned as one; and that the sheriff cannot be ruled to return the writ, after the expiration of six months, though requested before. *The King v. Adderly. Dougl. Rep.* 463.

A rule issued previous to the term, as of the term, is bad.

A rule was issued three days previous to Michaelmas term, and intitled of that term; the sheriff did not obey the rule; an attachment was granted, and the court set it aside as irregular. For such a rule is false in itself, irregular, and improper. *The King v. Sheriff of Cornwall. Term. Rep.* 1 V. 552.

Sheriffs to make return of writs in six days.

Notice is hereby given to all sheriffs and undersheriffs, That upon being served with a rule peremptorily to return any writ, issuing out of this court, or to bring in the body of any defendant, within six days after notice, if the same be not done in the said time, they will be liable to an attachment without further rule. *M. 6 Geo. 2.*

London and Middlesex now in four days.

By rule *Trin.* 6 Geo. 3. "The sheriffs of London and Middlesex are to return the writs in four days next after the service of the rule, and to bring in the body within four days next after service of a rule for that purpose, or be liable to an attachment."

N. B. The above rule has made no alteration respecting any other cities, towns, or counties; therefore they have six days, as heretofore.

How

How to proceed.

If the plaintiff be dissatisfied with the bail taken by the sheriff, he may, upon the *return day* of the writ, get a rule from the clerk of the rules to return the same; pay 4s. 6d. serve copy on the deputy secondaries (*if in London*), at their office in Grocer's Alley, if in *Middlesex*, at the sheriff's office, or Mr. Burchall, or Mr. Cater; shew the original rule (on which copy put your officer's name who arrested the defendant), and at the expiration of the rule, go to the treasury chamber, *Westminster-hall*, search the *custos breviarum* there, for return of the writ; if you do not find it, then move for an attachment against the sheriff upon this affidavit.

How to compel,
&c.

A. B. of, &c. maketh oath and faith, that he did on the 7th day of *November* instant, serve Mr. Burchall, who is, or acts as the deputy sheriff of the county of *Middlesex*, with a true copy of the rule hereunto annexed, and at the same time shewed him the said original rule: And this deponent further saith, that he did this morning search, with the *custos breviarum* of this court, for the return of the bill of *Middlesex* issued in this cause, but the same was not filed with him.

Affidavit of service of the rule and search in the *custos breviarum*,

N. B. The search must be made of the term the writ is *returnable*; but if the sheriff has returned and filed the writ, and it should be returned *cepi corpus*, if bail is put in in due time, first except against them (*but not otherwise*); then get a rule to bring in the body at the same office; serve sheriff with copy as before, and if not justified in due time (*at the expiration of the four days next after the service*), make affidavit thereof, give it to counsel with instructions thereon, fee 10s. 6d. to move for an attachment against the sheriff for not bringing in the body, "*pursuant to the rule.*"

Pay 4s. 6d.

It is held that the service of a rule to return the writ on the undersheriff's agent in town, is not sufficient. *The King v. Coles. Dougl. Rep. 420.* I believe

Service on the agent.

lieve that the agents for *Kent, Sussex, and Surry*, accept them.

Affidavit of service of rule to bring in the body to move for attachment.

^a If in Middlesex, say,

"*Mr. Burcball, or Mr. Cater,*"

^b deputy sheriff of the county.

John Taylor, clerk to *Samuel Rogers* of *Fleet-street, London*, gentleman, attorney for the plaintiff in this cause, maketh oath and faith, That he did on the day of *November* instant, personally serve *Mr. Hill*^a, with a true copy of the rule hereunto annexed, and which said *Mr. Hill* is or acts as the deputy^b secondary of the compters, and at the same time shewed him the said original rule; and this deponent further faith, That bail above was put in, but that the same is not perfected.

N. B. Here state the fact, "*or that no bail above has been put in by the said defendant.*"

Rule for attachment.

In the evening get the rule at the clerk of the rules for the attachment, carry it to the crown-office, and one of the clerks there makes out your attachment; pay 13s. 4d. *N. B.* No one particular clerk in court does this, therefore the general rule is to take your own clerk, for which you pay him as above.

Attachment criminal process.

The attachment is a criminal process, and lies against the *present* or *late* sheriff for not returning the writ. Against the *present* sheriff it is directed to the coroner, against the *late* one, to his successor.

When may be moved for.

It may be moved for on the *last day* of term, *1 Burr. 651.* and until it issue, the proceedings are on the civil side of the court. But when it issues, the king is to be named as prosecutor. *3 Term Rep. 133. 253.*

If no bail is put in at all, either by the sheriff or defendant, then after the rule to bring in the body is expired, make affidavit in this manner:

Affidavit when no bail is at all put in.

J. W. of, &c. maketh oath and faith, That he did, on the day of *November* instant, personally serve *Mr. Hill*, who acts as the deputy secondary of the compters, with a true copy of the rule hereto annexed, *at the same time shewing him the said original rule:* and this deponent further faith, That no bail above has been put in for the said defendant.

An affidavit to support a rule for an attachment of contempt must state personal service, and that the original rule was shewn at same time. *The King v. Smithies.* 3 Term Rep. 351.

How to proceed if the Sheriff be out of Office.

The sheriff being ruled to return the writ, either does, or does not, return it. If there be no return, it is a contempt of the court; for which, the constant course of proceeding is by *attachment*, whether against the *present* or *late* sheriff. For as to the late sheriff, he ought in strictness to have returned the writ, before he was out of office, and therefore the contempt was actually committed whilst he was a servant of the court. *Dougl.* 464. *The King v. Adderley.*

Mr. J. Buller said, that when the sheriff should come to purge the contempt, it would be competent for the court to moderate the punishment, and not to impose a fine to the amount of the whole debt; though in order to proportionate it to the actual damages, he thought they must be ascertained by a jury. *Ibid.*

A sheriff is not bound to return his writ after he has been six months out of office, 20 Geo. 2. c. 37. therefore if he is out of office before you call on him for a return of the writ, you may *within the six months* get a rule upon him (naming him as the late sheriff) to return the writ, which is to be served at the same office as before mentioned; and if he returns *cepi corpus*, then in order to compel him to bring in the body, you may now have a rule for that purpose, according to the following rule of court, which will be better than proceeding by *distringas*:

How to proceed if sheriff out of office.

Trinity Term, 31 Geo. 3.

It is ordered, that from and after the last day of this term, where any sheriff before his going out of office shall arrest any defendant, and *cepi corpus* shall be returned, he shall and may within the time allowed by law, be called upon to bring in the body, by a rule for that purpose, notwithstanding he may be out of office before such rule shall be granted,

New rule that late sheriff shall bring in the body by a rule.

By the Court.

N. B.

Sheriff not liable to be called on to return process unless within 6 lunar months, and the day on which he goes out of office is to be reckoned as part of the six months.

N. B. The proceeding by *disfringas* to compel the late sheriff to bring in the body, is now at an end.

The defendant, who was sheriff of *Warwickshire*, went out of office 12th Feb. 1780, at 4 in the afternoon, and was not served with the rule to return the writ until the 30th of July following. Rule was made for an attachment for not returning the writ. The sheriff moved for a rule why a *superfedeas* should not issue for not obeying the first rule: *February* in this year consisted of 28 days, and therefore if the day on which the office expired was to be reckoned in, to make up the six months allowed by stat. 20 Geo. 2. c. 37. s. 2. the rule was served a day too late, and the defendant was intitled to the protection of the statute. Lord Mansfield, The old sheriff on the 12th of February, turned over by indenture to his successor all unexecuted process. The act purports to be made for the ease of sheriffs with regard to the return of process. The act of quitting the office by turning over the writs, &c. to the new sheriff, was done by the defendant on the 12th of February. This being a penal proceeding against the defendant, who is intitled to the most favourable construction of a statute expressly made for the ease of sheriffs, we think the day of his leaving the office is to be computed as part of the six months, and therefore the rule to return the writ came too late. Rule for *superfedeas* made absolute. *The King v. Adderley. Dougl. Rep. 463.*

If sheriff be in contempt before defendant's death, an attachment may issue.

An attachment having been obtained against the sheriff of *Middlesex*, for not bringing in the body in a cause, *Robins v. Hall*; rule was made to set it aside, because defendant died before attachment issued, though not till after the contempt incurred. Court was opinion, that as the sheriff was in contempt before the defendant's death, the attachment was regularly issued. And though the original cause abated by his death, yet that was no reason for setting the attachment aside, since he was in contempt before. *The King v. Sheriff of Middlesex. 3 Term Rep. 133.*

When sheriff not liable to return writ.

A sheriff is not liable to an attachment for not returning a writ, if not called upon by a rule of court within

within six months after the expiration of his office, notwithstanding he was requested by the party to return it before the six months were expired. *The King v. Jones late sheriff of Carnarvonshire, Term Rep. 2 V. 1.*

The sheriff in order to save himself, may put in bail for the defendant (against his consent), upon receiving the rule to bring in the body, and justify the same.

If bail above should be put in in due time, and notice thereof given, then you must first except against the bail, and give notice to defendant's attorney, before service of the rule to bring in the body: or it will be irregular. *N. B.* Your rules must keep pace with defendant's time, or the proceeding will be irregular, otherwise the sheriff's officer by connivance might speed the time by returning the writ immediately; by which means a rule to bring in the body might be obtained *so as to expire the day the time for putting in bail is out.* In that case if the sheriff was fixed, the defendant to an action on the bond might plead *comperuit ad diem*; therefore the sheriff must have the same time allowed him to perfect bail, as the defendant, and it was so held in the Common Pleas. *Spicer v. Linnell, Easter T. 23 Geo. 3.*

If bail put in in due time, first except and then rule.

If you rule to return the writ and the sheriff has returned same, you have the election in case *no bail* is put in, either to take the bond, or proceed against the sheriff by taking out the second rule: but if the rule to bring in the body be *served* on the sheriff, you cannot then *take the bond.*

Election to proceed by taking out second rule or the bond.

An attachment having issued against the sheriff, and the debt and costs paid by him to the coroner, motion that further proceedings be stayed; *Cowper*, who shewed cause, contended that the plaintiff had *lost a term* (meaning trial) and therefore that the attachment ought to stand as a security, in case the plaintiff should recover a verdict. The court ordered the attachment to remain in the office *as a security* for the plaintiff's debt, and defendant to consent to trial at the sittings after term. *T. 15 Geo. 3. Gravett v. Williams, 4 Term Rep. 352.*

Court ordered attachment to stand as a security.

When

If sheriff fixed,
and defendant
has merits.

When the sheriff is fixed, and the defendant has merits, he may apply to be let in to the trial; and, if granted, the attachment will be ordered to lie in the office in the mean time, and defendant must be upon terms of taking such short notice of trial, &c.

Bail put in after
sheriff fixed, at-
tachment set
aside, and no be-
nefit from the
attachment.

Morgan moved to set aside the attachment against the sheriff on payment of costs, bail having been put in, and *no trial lost*, on the ground that the court would grant this of course as no trial had been lost. *Lord Kenyon* said, that the master had furnished them with a note of *Gravett v. Williams*, and reported the practice to be, that the attachment against the sheriff ought not to stand as a security, as no trial had been lost. And he desired that such might be considered to be the practice in future. Rule absolute. *Hill v. Bolt*, 4 Term Rep. 352. Vide the case of *Overton*, title *Special Bail*, page 146, where the court refused to let the bail justify after the sheriff was fixed.

The rule to bring in the body expiring, and the bail not justifying, make the following affidavit, (after stating the service of the rule on the under sheriff, or secondary) and shewing the original.

Affidavit for at-
tachment where
bail is put in,
but not justified.

And this deponent further saith, That the said defendant did put in bail above, but hath not justified the same, and the rule hereunto annexed since the service thereof is expired.

When you have got attachment from the crown office, make out bill of costs, adding the fee of 2l. 2s. and 2s. 6d. for the warrant, take same to the coroner, if in *London*, Mr. *Shelton*, if in *Middlesex*, Mr. *Walter* of *Shadwell*, or Mr. *W. Hodgson*, of *Charles Street, St. James's Square*, who will grant a warrant thereon.

May rule the
coroner.

Upon the return, if he does not pay the money, you may have a rule for him to return the writ of attachment, which get at the crown office, and serve him with copy; if he does not return it, make affidavit thereof, and the court on motion will grant an attachment, and order it to be directed to two *elisors*, being two or more persons named for that purpose by the master.

Common

An attachment was refused against a sheriff for Attachment re-
neglecting to make a replevin-bond, because the fused for not
party injured might maintain an action. *The King* taking replevin-
v. Lewis. 2 Term Rep. 617. bond.

When the sheriff is fixed for a contempt, he is Sheriff liable to
absolutely liable to the payment of the debt and costs; pay debt and
and cannot be relieved on the ground of the defend- costs.
ant's death, after the contempt was incurred, and
before the attachment issued. 3 Term Rep. 133.

Common Bail.

AT common law, the plaintiff and defendant
must in general have appeared in person, and
could not have appeared by attorney, without the
king's special warrant, by writ, or letters patent.
And now by *stat. West. 2. c. 10.* a general liberty is
given to the parties of appearing by attorney. Yet
there are certain persons, such as *ideots, feme coverts,*
&c. who, for want of legal discretion, are incapable
of appointing an attorney, and must therefore appear
in person; and any one else may still appear, and
prosecute or defend his suit in the same manner
as is usually done by attornies and prisoners. *Say.*
Rep. 277. 2 *Inst. 376. Gilb. C. P. 32.*

Appearance is the first act of the defendant in
court, which is the act of the court itself, as is evi-
dent from the language of the bail-piece. 1 *Salk. 8.*

Since the *stat. 12 Geo. 1.* common bail is reduced
to a mere appearance; the sureties in this case being
imaginary persons.

Common bail is to be filed for the casual ejector Ejectment.
in ejectment, before judgment be signed against him.
R. M. 33 Car. 2. T. 14 Car. 2.

An attorney subscribing process, be compelled to Attorney.
cause an appearance, or be liable to an attachment.
R. M. 1654. sect. 10.

By *stat. 5 Geo. 2. c. 27.* where the defendant is Common bail to
served with a copy of the process, he must cause be filed in 8
common days.

* M

common bail to be filed on *the return* or *within eight days after such return*. Sect. 1.

Warrant to be
filed.

By stat. 25 Geo. 3. c. 80. a warrant or memorandum to defend, must be delivered to the clerk of the common bails, with the bail-piece upon a 2s. 6d. stamp, who, for the ease of the practisers, has them ready printed in this form :

In the court of King's Bench.

Warrant.

London } J. F. is retained to defend by Luke
to wit. } Martin, as his attorney, at the suit of
Thomas More.

Entered or filed of record } J. T. Attorney, (if
this day of in the } by an agent, add) by
year of the reign of } L. M. his agent.

Common bail-
piece.

Michaelmas Term, in the 32d year of the reign
of king Geo. III. Stormont and Way.

London, } Luke Martin having been served with
to wit. } process, is delivered to bail to

John Doe, of London, yeoman,
and

Richard Roe, of the same place,
yeoman.

J. T. Attorney, } At the suit of
November 15, } Thomas More.
1791.

To be written on parchment treble six penny stamp; file it with Mr. *Walter*, the clerk of the common bails at the King's Bench office, with the warrant or memorandum as before; pay 1s. 2d. in term time, and 1s. 6d. in vacation, and to be filed *the term the writ is returnable*. Rep. Temp. Hard. 138.

If Sunday inter-
venes.

Sunday is not to be accounted *one* of the days, if it happens to be the *last* of the eight days; as, for instance,

instance, if a writ be returnable on *Saturday*, the defendant has the whole of the *Monday* to file his common bail. Vide 1 *Burr.* 56. *Shadwell v. Angel.*

It is ordered, that all clerks and attornies for the plaintiff, upon signing of judgment by default, or *non sum informatus*, shall pay to the secondary of this court 1s. 6d. for the common bail, unless it was before filed, and the said 1s. 6d. shall be allowed the plaintiff in his costs. *R. Trin. 4 W. and M.*

Common bail to be filed upon judgment by default or *non sum informatus*.

The stat. 2 *Geo. 2. c. 27.* enacts, that in case the defendant does not file common bail within *eight days after the return of the writ*, the plaintiff may do it for him, on an affidavit being made of the service; in such case these words must be inserted on the bail-piece, under the attorney's name; "*filed according to the statute.*" *R. M. 10 Geo. 2. Reg. 1.*

When to be filed by defendant, or plaintiff may do it.

Thomas Moore, plaintiff,
In the King's Bench.

and

Luke Martin, defendant.

John Wills, clerk to *Robert Flower*, of the *Inner Temple, London*, gentleman, attorney for the above named plaintiff, maketh oath and saith, That he did, on the 4th day of *November* instant, personally serve the above defendant with a true copy of a bill of *Middlesex*; which appears to this deponent to be regularly issued out of this honourable court, and returnable on *Monday* next after the morrow of *All Souls*, under which said copy was written an *English* notice to the said defendant, of the intent of such service, pursuant to the statute in that case made and provided.

Affidavit of service of process.

a Latitat, alias capias, or pluries capias.

This affidavit may be sworn before a judge of the court, or commissioner authorized to take affidavits in this court, or the clerk of the common bails. *Stat. 5 G. 2. c. 27.* In town it is mostly sworn before the clerk of the common bails, or his deputy lawfully authorized.

Before whom sworn.

By 25 *Geo. 3. c. 80. s. 22.* Common bail may be filed by the plaintiff, according to the statute, without entering or filing of record any memorandum or

May be filed by plaintiff without the 2s. 6d. stamp.

M 2

minute

minute for the defendant; but no solicitor shall plead or carry on any further proceeding for such defendant (if common bail has been filed according to the statute), without filing the minute or memorandum before mentioned, under penalty of 5*l*. *Seet*. 23. If a defendant is added after commencement of an action, such a memorandum is not necessary. *Seet*. 24.

Common bail must be filed by the plaintiff according to the statute, before he can declare in chief. *Smith v. Painter*. 2 *Term Rep.* 719.

New rule.

By rule *E. T.* 30 *Geo.* 3. The clerk of the common bails shall mark the bail-pieces numerically as they are received.

In what Cases Common Bail will be ordered.

If the affidavit of the plaintiff be defective, *i. e.* swearing that the debt is due (as appears by the bond^a); as appears by the testator's books^b; to the penalty, instead of the principal and interest due on bond^c; or joining in one stamp, debt and *assumpsit*^d; taking out a writ where common bail has been ordered upon a former one, before the costs taxed and paid, upon a rule to discontinue^e; holding to bail one who was formerly arrested and superseded, though he gave a note for 20*l*.^f; for costs on a non suit upon a recovery in a foreign court, for malicious prosecution, where the affidavit only said, "due upon a judgment or decree^g;" upon a promise to pay after a commission issued, and certificate signed^h; upon a promise to pay two guineas *per* month after taking the benefit of an insolvent debtor's act, though part actually paidⁱ; on an old affidavit of a debt due sworn some time back^k; on a judgment after defendant hath been superseded^l; or on a second judgment; or where the original debt does not amount to an arrest, without the addition of costs^m; or where the defendant is held to bail on the judgment (where bail has been given in the original action), or that defendant is indebted to him in 200*l*. on promises,
Dougl.

^a Str. 1157.

^b Ib. 1219.

^c Ib. 1209.

1226.

^d 5 Burr. 2690.

^e Str. 1209.

^f Str. 1218.

^g Str. 1243.

^h 3 Burr. 736.

ⁱ Str. 1223.

^k Ib. 1270.

^l Str. 1039.

^m Ib. 975.

Dougl. Rep. Cope and another v. Cook. 468.; or on a judgment of nonsuit; 5 *Burr.* 2660. *Bush v. Bates*; or where the assignee or executor does not swear that they believe the debt is due; 1 *Term Rep.* 716; the court can order common bail, although defendant hath put in special bail, if the case requires itⁿ; ⁿ *Str.* 1077. also if there be not separate affidavits filed where there are more defendants than one, and the cause of action be not joint. *Dougl. Rep.* 218. *Gilby v. Lockyer.* *Vide title Affidavit.*

Filing common bail voluntarily, invalid, unless Filing C. B. voluntarily. a writ is sued out in *fourteen days* after such appearance. *R Trin.* 4 *W. & M.*

If baron and feme are sued, the baron must appear for himself and wife. Baron and feme.

If an attorney undertakes to appear in writing, the court will order him so to do, or in default grant an attachment. *Str.* 693. *Loft. Rep.* 192, 193.

If a writ be served on the defendant by a wrong name, he may be declared against by his right name *after his appearance*; but you cannot appear for the defendant according to the statute, contrary to the name in the writ. 3 *Term Rep.* 611. *Doo v. Butcher.* In common process, I do not conceive it necessary that the declaration need state, that he was served by the *wrong name*. If there be an arrest and bail put in, it is necessary, because the bail-piece always states the real name of the defendant, with the addition of "*having been arrested by the name of John.*"

Common bail must be filed where you enter up judgment on a warrant of attorney, on pain of 10s. to the box. *Hil.* 1 *W. & M.* And by *Stat.* 25 *Geo.* 3. c. 80. a memorandum or warrant is to be filed on a 2s. 6d. stamp with the clerk of the common bails, previous to entering the judgment. *Sect.* 19. *Vide Judgment on Warrant of Attorney.*

Common-bail on a warrant of attorney.

Security for Costs.

Formerly refused,

It seems that a motion has been made often for securing to the defendant, in case he succeeds in his action, the costs. This the court refused in the late reign, unless in actions *qui tam*, &c. giving as a reason that it would affect trade, and be excluding foreigners from obtaining justice in our courts. *Lamii v. Sewell*, 1 *Wils.* 266. *Str.* 126. 4 *Burr.* 2605. *Boswell v. Irish*, *Cowp. Rep.* 158.

The cases in ejectment are considered as more under the power of the court than other proceedings, and therefore the court has stayed a second, till the costs were paid of the first. *Real & al. v. Macay*, *Str.* 1206.

Lessor of plaintiff an infant,

Lessor of plaintiff an infant, or abroad, shall name a good plaintiff or give security for costs. 1 *Wils.* 130. *Anonymous.*

Lessor residing in Ireland,

Lessor of plaintiff residing in *Ireland*, shall give security for costs, though ejectment is brought by the direction of chancery, where security is already given. *Denn v. Fulford*, 2 *Burr.* 1177.

Now granted.

It seems now that this rule will be granted in all actions brought by foreigners, and for this reason, that if a verdict be given against the plaintiff, he is not within the reach of our law, so as to have process served upon him for the costs. *Pray and others v. Edie*, *Term Rep.* 1 *V.* 267.

If an Englishman sue in a foreign court, he must give security for costs: and therefore a like rule was made against the plaintiff, who resided at *Waterford* in *Ireland*. *Fitzgerald v. Whitmore*, *Term Rep.* 1 *V.* 362.

In the case of *Doe ex dem. of Selby v. Ashton*, baronet, Mr. Justice Buller said, There are only three instances in which the court will interfere on behalf of a defendant, to oblige the plaintiff to give security for costs; the first is, when an infant sues, the court will oblige the *prochein amy*, or guardian, or attorney, to give security for the costs.

Secondly,

Secondly, Where the plaintiff resides abroad ; in which case the court will stay the proceedings till security is given for the costs ; and,

Thirdly, Where there has been a former ejectment ; but there the rule is to stay the proceedings in the second ejectment, till the costs of the former are paid, and not till security is given for the costs of the second. *Term Rep. 1 V. 491.*

A rule calling on the lessor of the plaintiff to shew cause why the proceedings in this action should not be staid till he gave security for the costs in case he was non-suited or a verdict given against him. This rule was founded on an affidavit, stating that in the former ejectment the court of exchequer had obliged the lessor of the plaintiff to give security for the costs of that action. *Buller, J.*—The form of the present application is wrong. But it is not stated that the costs of the ejectment in the court of exchequer have not been paid. *Ibid. Rule discharged.*

This mode of application may be made by summons or motion, and it is referred to the master to take the security.

Declaration.

THE declaration is a legal specification of the cause of action, and if the proceeding be by *original writ*, the plaintiff must declare for the *same cause* of action as is there expressed. But if the proceeding be by *bill*, then the declaration is a *mere copy of it*, and in either case, it should *correspond* with the *process*, in the *names and descriptions of the parties* : for if there be a *material variance*, the court will set aside the proceedings : Unless where the process is taken out against the defendant by a *wrong name*, and he appears by his *right name*, there the plaintiff may declare against him by the *name in which he appears*, stating that he was arrested by the other ;

for by appearing, the defendant admits himself to be the person sued; and so the variance is immaterial. 3 Term Rep. 611. *Boyne v. Mills*.

The substantial rules of pleading are founded in strong sense and in the soundest and closest logic, and so appear when well understood and explained; though by being misunderstood and misapplied, they are often made use of as instruments of chicane. *Robinson v. Raley*, 1 Burr. 319.

It is one of the most honourable, laudable, and profitable things in our law, to have the knowledge of well-pleading in actions, real and personal. Co. Lit. f. 534.

Rules respecting the Declaration.

1. The parties demandant or plaintiff, tenant or defendant, ought to be well named.
- Time. 2. So the time of a matter charged in the declaration ought to be certainly alledged; and therefore in assumpsit, the day being omitted on which the promise is made, it is bad. *Yel. 94. Pl. Com. 24.*
- Place. 3. So a certain place ought to be alledged where every fact material and traversable was done. *Kitch. 226.*
- Gift of the action. 4. The gift, and every thing that is of the essence of the plaintiff's action, must be set forth in the declaration; and herein we may lay it down as a general rule, that that seems properly to be the essence of the action without which the court could have no sufficient grounds to give judgment; and this is to be determined in every action according to its nature. *Doctr. Pl. 85.*
- If declaration not sufficient. 5. If the declaration be not sufficient foundation to give judgment, this may be moved in arrest of judgment after verdict, because judgment cannot be given when it appears that, though the fact be found for the plaintiff, yet he has not sufficient cause of action. *Ibid.*

6. It is a general rule in pleading, that the declaration must shew a *title* in the plaintiff, and that it is regularly true, that if the plaintiff will himself discover to the court any *thing*, whereby it may appear that he had no cause of action when he commenced it, his writ shall abate. *Cro. Eliz.* 325. *Moor.* 598.

7. It is laid down as a general rule, that in all cases where an interest or estate commences upon condition, be the condition or act to be performed by the plaintiff, defendant, or any other, and be it in the affirmative or negative, there the plaintiff ought to shew it in his declaration, and aver the performance of it; for the interest or estate commences in him upon the performance of the condition, and not before. But when the interest of the estate passes presently, and vests in the grantee, and is to be defeated by matter *ex post facto*, or condition subsequent to the condition to be performed in the affirmative or negative, or to be performed by the defendant or any other; there the plaintiff may count generally, without shewing of any performance, and this shall be pleaded by him who is to take advantage of it. *7 Co.* 10. *Lill. Reg.* 418.

Although the plaintiff must set forth in his declaration every material *thing*, and without which he could not be entitled to his action; yet herein the law requires no greater certainty than the nature of the *thing* is capable of; and therefore if a *contract* be made in general terms, the declaration upon such *contract* may be in the same terms. *3 Lev.* 319.

8. It must contain such certain affirmation that it may be traversed; for if there be no certain affirmation to make the declaration itself traversable, it will not be cured after a verdict, because it is a defect in substance. *Co. Lit.* 303. *Cro. Jac.* 361. *2 Bulst.* 214. *Cro. Eliz.* 33. 441. *2 Saund.* 319.

9. The law requires no greater certainty than the nature of the thing will admit of; as where an action is brought for *things* not subject to distinction by

Must shew a title.

Where estate commences on condition, to aver performance.

When may count generally.

No greater certainty than the thing is capable of.

Must contain certain affirmation.

Law requires no greater certainty than the thing will admit of.

by number, weight, or measure; as in trespass for breaking his close with beast, and eating his peas, without saying how much; yet this declaration hath been held good, because nobody can number or measure the peas that beasts can eat. *Stile* 136. 2 *Salk.* 642. 1 *Lord Ray.* 588. 2 *Wilf.* 292.

If thing is well described,

10. That where the *thing* is well described, the court ought not to be too strict in scanning the words; and that if the *thing* is so described that the jury may know what is meant thereby, it is well enough. *Stile* 235. 1 *Lord Ray.* 588.

When the thing is laid by way of aggravation.

11. Where a *thing* is laid in the declaration by way of *aggravation*, though such allegation is uncertain, or that circumstance is not proved to the jury, yet this shall not arrest the judgment; because the *gist* of the action is the *thing* itself in demand, and the *aggravation* is only the manner of doing it; and though this may increase the damage something, yet it is not to be out of *proportion* to the *thing* in demand. *Cro. Jac.* 664. 7 *Mod.* 142. *Sty.* 25. 199. 1 *Lev* 301. 303. *Lord Ray.* 991. *Str.* 827. *Keb.* 825. 2 *Wilf.* 292.

If good in part.

12. If a declaration be good in part, though bad as to another part, the plaintiff is intitled to judgment for so much as is well alledged, especially if it be not of an entire demand. 10 *Co.* 115. *Rel. Ab.* 784, 785. 2 *Show.* 103. 1 *Salk.* 133. Vide 3 *Burr.* 1235.

To prevent unnecessary length in declaration.

13. For preventing unnecessary length of declarations, "*It is ordered*, that in actions of covenant, the declaration is not to repeat more of the deed than is necessary for the assignment of the breach, and not to repeat the covenant in the conclusion."

Covenant.

Slander.

14. In actions of slander long preambles be forboren, and no more inducement than what is necessary for the maintenance of the action; but when it requires a special inducement, or colloquium.

On statutes.

15. That in actions upon general statutes, the declaration not to repeat the statute, but to conclude against the form of the statute in such case made

made and provided; as in case of debt upon the Stat. 2 Ed. 6. for tithes, and 32 H. 8. for maintenance, 21 Jac. of monopolies.

16. That in actions of debt upon judgment had in the courts at *Westminster*, to recite only the judgment; but if a judgment had by or against an executor or administrator, then the action of debt upon that judgment, to repeat the declaration and judgment. *R. M. 1654. f. 13.*

Debt on judgment.

In an action against the sheriff for taking goods without leaving a year's rent, the declaration need not state all the particulars of the demise, but if it does, and they are not all proved as stated, there the plaintiff shall be nonsuit. *Bristow v. Wright. Dougl. 664.*

What a declaration in covenant need not state.

Lord Mansfield: I have always thought, and often said, that the rules of pleading are founded in good sense. Their objects are *precision* and *brevity*. Nothing is more desirable for the court than precision, nor for the parties than brevity. It is easy for a party to state his ground of action. If it is founded on a deed, he needs not set forth more than that part which is necessary to entitle him to recover. *Cowp. 665.* If he states what is impertinent, it is an injury to the other party, and may be struck out, and costs allowed upon motion. *Ibid. 727.* I remember a case where, in an action on one covenant, the whole of a very long deed was set forth. The court referred it to the master, and all was struck out except the covenant on which the action was brought, and costs paid to the amount of 100*l.* When I say that a plaintiff need only set forth that part of a deed on which his action is founded, I do not mean to say that even that is necessary. He is not bound to set forth the material parts, in letters and words. It will be sufficient to state the substance and legal effect. That is shorter, and not liable to misrecitals and literal mistakes. The distinction is between that which may be rejected as surplusage (which might have been struck out on motion) and what cannot. Where the declaration

contains impertinent matter, foreign to the cause, and which the master on a reference to him would strike out (irrelevant covenants for instance), that will be rejected by the court and need not be proved. But if the very ground of the action is misstated, as where you undertake to recite that part of a deed on which the action is founded, and it is misrecited, that will be fatal: for then the case declared on is different from that which is proved, and you must recover *secundum allegata et probata*. *Dougl. Rep.* 665. *Brislow v. Wright and another*.

Variance.

The process was "to answer the plaintiff *qui tam* " *pro domino rege quam pro se ipso sequitur*:" the declaration was in his own name only; omitting the *qui tam* part. Court held the variance to be fatal, and ordered the proceedings to be set aside. *Canning v. Davis*. 4 *Burr.* 2417. But Mr. Justice Yates said, though the plaintiff may stile himself executor, or give himself any other superfluous description in the process, and declare otherwise; yet this will not hurt, for the demand is still the same: But in this case the very nature of the demand is altered; the process, importing a demand to the king and plaintiff, and the declaration, a demand to the plaintiff only. 2 *Black. Rep.* 722. *Lloyd v. Williams*.

In a subsequent case the proceedings were set aside where the process was to answer the plaintiffs as assignees of a bankrupt, and the declaration was in their own right; for the plaintiffs cannot declare generally, on process sued out in a special character. *Mcggs assignee, v. Ford*. E. 25 *Geo.* 3.

May declare *qui tam*, though process is not so.

Court said, it was not usual to insert in the bill of *Middlesex*, on what account, or in what light the party sues, as in the case of executors and administrators, the case of an assignee of a bail bond, and the like, when the process is only *ad respondendum* to A. B. 2 *Str.* 1232. *The Weaver's Co. qui tam, v. Forest*.

Plaintiff to give defendant particular of his demand.

Lord Mansfield thought it reasonable that in all cases (as well where attornies were plaintiffs, as where other persons were plaintiffs) the plaintiff ought

ought to give the defendant an account of the particulars of his demand. *Le Breton v. Braham.* 3 Burr. 1390.

This is now done by summons, and Mr. J. Buller reprobated a motion, as it is a matter of course, putting the parties to more expence than necessary; and, “*that in the mean time all proceedings be staid.*”

No action, &c. shall be staid, nor any judgment, sentence, &c. reversed, by reason of omission or defect in the entering or filing of record the memorandum or minute directed, but the court shall proceed the same as if such memorandum or minute were entered or filed. *Stat. 25 Geo. 3. c. 80. sect. 17.* Actions are to proceed though no warrant or memorandum filed by attorney.

There are two ways in which the plaintiff may declare; the one *on the return day* of the writ, which is called *de bene esse*, conditionally, until special or common bail be filed, or *after the day* for filing common bail, or the defendant has justified his bail, which is called *in chief*. If to speed the cause, the former is the best way of proceeding. And a rule to plead may be given on the same day. Two ways to proceed.

The writ was returnable the 15th of November, being the 2d return, and a declaration *de bene esse* was filed the 24th, to plead in eight days; held well delivered (though not till the 9th day), because two Sundays intervened. 1 Burr. 56. *Shadwell v. Angel.*

When a declaration is filed *de bene esse*, till common bail or appearance entered, or till special bail be filed, notice that it is so filed must be given to the defendant in writing. *Vide Proceeding by Original.* Notice.

When the declaration is drawn, ingross it on a treble penny stamp paper; charge on the back thereof 4d. per sheet (seventy-two words) and duty 3d. per sheet, warrant 4d. *R. T. 12 W. 3.* and if the plaintiff's attorney files common bail, *R. M. 5 Ann. Reg. 2.* according to the statute, he charges 7s. 2d. more. Declaration how prepared.

It

Defendant's attorney to pay for copy of declaration.

4d. per sheet, computing 72 words to a sheet, and duty.

It is ordered, that upon the appearance of any attorney, or other person, for any defendant in this court, the plaintiff's attorney shall not be bound to deliver to the defendant's attorney the original declaration; but instead thereof, shall deliver a true copy of such declaration, and that upon the delivery or tender thereof, the defendant's attorney, or other person acting for him, shall pay unto the plaintiff's attorney or other person acting for him, for the copy of such declaration after the rate of 4d. per sheet copyways, together with the stamps or king's duty thereon, which shall serve and be in lieu of the copy of such declaration usually made by the defendant's attorney. *R. T. 12 W. 3.*

Of declaring where Special or Common Bail is filed.

How declaration to be delivered if common or special bail be filed.

It is ordered, that in every cause in which special or common bail be filed, and notice thereof given to the attorney for the plaintiff, a copy of the declaration shall be delivered to the defendant's attorney, who shall pay for the same according to the usual rate; but if the attorney for the defendant, or his clerk in his absence, refuses to pay for such copy, or if it shall happen that the abode of the defendant's attorney be unknown to the plaintiff's attorney, then it shall be lawful to leave such copy with the officer of this court appointed for affiling declarations; and notice thereof shall, without delay, be given to such defendant or his attorney; and such declaration shall be held well delivered from the time of such notice only. *R. Trin. 2 Geo. 2.*

Of declaring when Plaintiff files Bail according, &c.

The plaintiff cannot declare in *chief*, unless common bail be filed by defendant, or he has done it for him. *Smith v. Painter, 2 Term Rep. 719. 1 Term Rep. 635, Cooke v. Raven.* And it must be filed the term the writ is returnable. *Rep. Tem. Hard. 138.*

In

In all causes where a *copy* of the *process* of this court is served upon any defendant or defendants, and an appearance is *entered*, or *common bail* filed for such defendant or defendants, by the plaintiff's attorney, pursuant to the act, the plaintiff's attorney, in such case, shall leave a copy of the declaration in the office with the proper officer appointed for that purpose, and likewise give notice thereof to the defendant or defendants, by delivering an *English* notice written in secretary hand, to such defendant or defendants, or by leaving the same at the last or most usual place of abode of such defendant or defendants; in which notice shall be likewise expressed *the nature of the action*, and at *whose suit* prosecuted, and the *time limited* by the rules of this court, for such defendant or defendants *to plead* to such action; and that in case such defendant or defendants do not plead to such declaration by such *limited time*, so to be *expressed* in such notice, judgment will be entered against such defendant or defendants by default. And from the time of giving such notice as aforesaid, such declaration shall be deemed well delivered to such defendant or defendants, and not otherwise. And in case such defendant or defendants (after such notice given) do not plead by the time the rules for pleading are out, the plaintiff in such case may sign his judgment, without any other or further calling for a plea, and thereon give notice of executing his writ of inquiry, either by delivering a notice in writing to such defendant or defendants; or by leaving the same at the last or most usual place of abode of such defendant or defendants; which shall be a sufficient notice to such defendant or defendants of the time of executing such writ of inquiry. *R. T. 1 Geo. 2.*

It was held that delivery of a declaration before the end of the second term, by leaving it in the office, though *no notice* was given, was a good delivery to prevent a nonpros. *West v. Radford*, 3 Burr. 1452. 2 Term Rep. 112.

How to deliver declaration if plaintiff appears for defendant according to the statute.

Well delivered from the time of notice.

If no plea, judgment may be signed, and notice of executing inquiry given.

Of

Of declaring de bene esse on Common Process.

Of delivering
declaration *de
bene esse*, where
no affidavit filed,
upon process re-
turnable before
the last return.

It is ordered, that upon all process to be issued out of this court, returnable *before the last return of any term*, where *no affidavit* shall be made and filed of the cause of action, pursuant to the act of parliament for preventing vexatious arrests, the plaintiff may file or deliver the declaration *de bene esse*, at the return of such process, with notice to plead in *eight days* after the filing or delivery thereof; and if the defendant doth not file common bail, and plead within the said *eight days*, the plaintiff, having filed common bail for such defendant according to the said act, may sign judgment for want of a plea, provided that such declaration be *delivered or filed*, and notice thereof given *four days exclusive*, *before the end of such term*, and a rule to plead be duly entered. *Rule Trinity Term, 22 Geo. 3.*

The like on Bailable Process.

Of delivering de-
claration *de bene
esse* where an af-
fidavit is filed.

Upon process to be issued and *made returnable as aforesaid*, where *an affidavit* shall be made and filed of the cause of action, pursuant to the said act, the declaration may be filed or delivered *de bene esse* at the return of such process, with notice to plead in *four days* after such filing or delivery, if the action be laid in *London or Middlesex*, and the defendant lives *within 20 miles of London*; and in *eight days* if the action is laid in any other county, or the defendant lives above 20 miles from *London*. And if the defendant puts in bail, and doth not plead within such times as are respectively before mentioned, judgment may be signed; provided that such declaration be delivered or filed, and notice thereof given, *four days exclusive before the end of such term*, and a rule to plead be duly entered. *Rule Trinity Term, 22 Geo. 3.*

When defendant
is intitled to an
imparlance.

If the process be returnable on the last return of any term, defendant is intitled to an *imparlance*; and in

in such case, the notice must be for defendant to plead within the first four days of the next term.

Of declaring by the by.

A general rule for settling and declaring the practice Declaring by the
of this court touching declaring by the by, in cases by.
where the plaintiff, in any action or suit, hath filed or
shall file common bail for the defendant, pursuant to the
late act of parliament, For preventing frivolous and
vexatious arrests: "It is ordered, that in all such
cases the plaintiff in such action or suit, wherein
common bail hath been or shall be so filed as afore-
said, may deliver a declaration by the by against
such defendant, in like manner as might have been
done by the antient course of this court. But that
no other person except such plaintiff is or shall be ca-
pable of delivering a declaration by the by against any
defendant, by reason of common bail being so filed
by any plaintiff as aforesaid." R. M. T. 10 Geo. 2.

When the defendant has filed common or special
bail for himself, any person may deliver or file a de-
claration against him by the by, at any time during
the term wherein the process against the defendant is
returnable, *sedente curia*; and the practice hath been,
that the plaintiff, at whose suit the process is, might
declare against the defendant in as many actions as
he thinks fit, before the end of the next term, after the
return of the process. N. on the above rule.

If special or
common bail be
filed by defend-
ant, any person
may declare
against him by
the by.

Sulyard v. Harris.—This was a suit by bill,
against *Harris*, by two persons named *Sulyard*;
Harris was served with common process, not re-
quiring bail; he appeared at the return of the pro-
cess, and filed common bail. The next day, *Ed-
ward Sulyard* alone, one of the two plaintiffs, with-
out his companion, delivered a declaration by the
by against the defendant, and the defendant ob-
tained Mr. Justice *Yates's* order to stay proceedings,
and upon motion to set aside the order, the rule was
made absolute for discharging the judge's order.
The practice reported by *Master Owens* is, That
N where

If defendant file
bail, any other
plaintiff may de-
clare by the by
against him,
within the term
the writ is re-
turnable.

where the proceeding is by bill, if a defendant is in court, either by being in actual custody of the marshal, or by a voluntary appearance at any plaintiff's suit, any other plaintiff is at liberty to deliver a declaration by the by against him, within the same term wherein the writ was returnable. 4 Burr. 2180.

What is a
waiver of bail.

The delivery or filing of a declaration before special bail is put in, is a waiver of the bail; unless the same is delivered or filed *de bene esse*; and if the bail have not justified, is an acceptance of them, unless delivered *de bene esse*. N. on R. M. 10 Geo. 2. Reg. 2. (b).

If the bail are put in and have till the first day of the next term to justify, deliver your declaration *de bene esse*, with notice to plead in the first four days of the next term before the *essoign* day.

What discharges
bail by original.

If an original be sued out in one county, and the declaration laid in another, though it be good against the defendant, yet the bail are discharged, and not liable to a *sci. fa.*; otherwise if by bill. 3 Lev. 235. 245. So if plaintiff declare contrary to the *ac etiam* in the writ. Ibid. N. on R. E. 2 Geo. 2. (a).

Within what
time to declare.

The plaintiff must declare before the end of the term next after the return of the process, or the defendant may sign a *nonpros* (except in replevin) without entering any rule to declare, and the defendant shall have costs taxed as usual, 13 Car. 2. c. 2. s. 5. and no rule to declare need be given in this court, either by bill or original.

Mr. Justice Buller. By the general rules of law, a plaintiff must declare against a defendant within twelve months after the return of the writ. But by the rules of the court, if he do not deliver his declaration within two terms, the defendant may sign judgment of *nonpros*. Though unless he take such advantage of the plaintiff's neglect, the plaintiff may still deliver a declaration within the year. 2 Term Rep. 112. Orley v. Lee. 3 Term Rep. 123. Perry v. Harvey.

Nonpros.

The defendant cannot sign a *nonpros* unless he enter his appearance within the term the writ is returnable.

turnable. *Cas. Temp. Hard. 138. 2 Term Rep.*

719.

To prevent a nonpros being signed, the plaintiff may get a side-bar rule from the clerk of the rules, if the defendant is not in custody, the last day of the second term, for time to declare until the first day of the next term, for which pay 4s. 6d. serve defendant's attorney with a copy, or stick a copy up in the office if he does not appear: And he may have as many rules as he likes from term to term, but there must be two in a term, viz. one from the first day of the term to the last day, and the other from the last day, to the first day of the next term. But the defendant may, if he thinks proper, move the court, that the last rule may be peremptory, which is done by giving counsel instructions, on a brief for that purpose, with 10s. 6d. annexing an office-copy of the last rule to declare; draw up rule at the clerk of the rules, serve copy on plaintiff's attorney. *N. B.* The rule is peremptory in the first instance.

This rule cannot be had where the defendant is a prisoner. But if the writ be against two others as well as the prisoner, and the two cannot be found, the court will grant rules for time to declare against the prisoner, until the other two be outlawed.

2 *Cromp. 9. Tidd, 223.*

N. B. The clerk of the rules will make this rule special on being spoke to.

Notice of Declaration.

In all notices, care is to be taken that the cause be properly named, as well as the court in which the suit is instituted; and in notices of declaration, the nature of the action is to be expressed, and at whose suit prosecuted, and the time limited to plead to such declaration.

R. T. 1 Geo. 2. directed to the defendant.

John Denn, plaintiff,

In the King's Bench,

and

Richard Fenn, defendant.

Take notice, that a declaration was this day filed with the clerk of the declarations in the King's Bench office in the Inner Temple, London, conditionally.

N 2

Time to declare may be obtained.

Notice of declaration de bene esse, where the action is bail-able.

If in the country,
eight days.

tionally (until special bail is put in and perfected), as of this present *Michaelmas* term, against you, at the suit of the above-named plaintiff, in an action of trespass on the case on several promises, to the plaintiff's damage of 10*l.* and unless you plead thereto in four days from the date hereof, judgment will be signed against you by default. Dated this 7th day of *November* 1791.

Yours, &c.

R. S. attorney for plaintiff.

To Mr. *Richard Fenn*, the above-named defendant.

The like upon
common process.

Take notice, that a declaration was this day filed with the clerk of the declarations, in the King's Bench office, in the *Inner Temple, London*, conditionally (until common bail is filed), as of this present *Michaelmas* term, against you, at the suit of the above-named plaintiff, in an action of trespass on the case on several promises, to the plaintiff's damage of 10*l.* and unless you appear and plead thereto in eight days from the date hereof, judgment will be signed against you by default. Dated this 7th day of *November* 1791.

Yours, &c. R. S. att. for plaintiff.

To Mr. *C. D.* the above defendant.

The like upon
common process,
where bail or
appearance is
filed according
to the statute.

Take notice, that a declaration was this day filed with the clerk of the declarations, in the King's Bench office, in the *Inner Temple, London*, as of this present *Michaelmas* term, against you, at the suit of the above-named plaintiff, in an action of trespass on the case on several promises, to the plaintiff's damage of 10*l.* and unless you plead thereto in four days from the date hereof, judgment will be signed against you by default. Dated this 16th day of *Nov.* 1791.

Yours, &c.

J. S. attorney for plaintiff.

To Mr. *C. D.* the above defendant.

This notice will do where bail is perfected: or for a declaration filed by the by, only say "filed by the by."

If the declaration be delivered of *Trinity*, to plead in *Michaelmas*, then say, unless you plead thereto within the first four days of next *Michaelmas* term, judgment will be signed against you by default. If filed of another term.

Of intitling and laying the Day in Declaration.

It is usual when the cause of action will admit of it, to entitle the declaration generally, of the term in which the writ is returnable: But it should always be entitled, after the time when the cause of action is stated to have accrued: therefore, where the cause of action is stated to have accrued after the first day of the term in which the writ is returnable, the declaration should be intituled of a subsequent day in that term, and not of the term generally; for a general title refers to the first day of the term, upon such a title it would appear, that the action was commenced before the cause of it accrued. Yet where the cause of action was stated to have accrued on the first day of term, the court on demurrer held, that the declaration might be entitled of the term generally, for the delivery of the declaration is the act of the party, and in ancient times it could not have been delivered till the sitting of the court; so that the cause of action might well have accrued, before the actual delivery of the declaration. *Pugh v. Robinson.* 1 Term Rep. 116. Vide 2 Lev. 176. Where a declaration is improperly intituled, the plaintiff may have it corrected, on an affidavit of the fact. *Symonds v. Parminster and another.* 1 Wils. Rep. 78.

Or it may be set right at the instance of the defendant: Thus where the declaration is intituled of the term generally, and the defendant plead *plene administravit*, or a tender made before the exhibiting of the bill, upon which he would give in evidence an administration of assets, or tender made, between the first day of the term to which the bill re-

lates, and the day of suing out the writ; he has a right to call upon the plaintiff, to intitle his declaration properly, *Cas. Temp. Hard. 141.* or to make up the paper book with a memorandum according to the truth of the fact. *Smith v. Key. 1 Str. 638.* In *Smith v. Raydon. M. 12 Geo. 1.* the court ordered a special memorandum to be made in order to give the party leave to plead a tender. Cited in *1 Wils. 39.*

Per curiam, the defendant has a right to call upon the plaintiff to intitle his declaration agreeable to the true time of delivering it to the defendant. *Thompson v. Marshall. 1 Wils. 304.*

The court held that a declaration ought to be intitled of the term in which the writ is returnable; and if not, to prevent the plaintiff's further claim, the defendant may have a judge's order for that purpose. And where a writ was served, returnable in *Michaelmas* term 1788, the declaration was not delivered till *Hilary*; and including a debt due to the plaintiff from *Michaelmas* to *Hilary*, it was held, he could not recover that debt, for he ought to have intitled his declaration of the term in which the writ was returnable. *Smith v. Mullen. 3 Term Rep. 624.*

If the cause of action arises within the term the declaration is of, then do not intitle it as of the term generally, but make a special day after the cause of action accrued, as, "*Thursday next after the morrow of All Souls, in Michaelmas term, in the 32d year of the reign of king Geo. 3.*" instead of "*Michaelmas term generally.*"

In what actions the day is material.

If the plaintiff declares on a note the day is material, and an essential part of the agreement, from which he cannot vary; so on a bond or other writing; but in the case of a common *assumpsit*, the day is alledged only for form, and therefore the defendant cannot confine the plaintiff to the day alledged in the declaration. *Ibid. Str. 21. Vide Co. Lit. 283. Plow. Com. 24. a.*

In

In other cases, as in trespass, assault, battery, &c. When not, the day is *immaterial*, but is in general laid after the cause of action accrued, and before the term or time of which the declaration is intitled.

In assault and battery, proof that the assault was on a day after the commencement of the suit, may be helped. 1 *Wils.* 171. *Hay v. Kitchen.*

In trover a demand and refusal appeared to be Trover. subsequent to the bringing of the action, for it appeared on the *nisi prius* roll, that the bill was filed of Easter term; and consequently as there was no special memorandum it must refer to the first day of that term, which was in the beginning of April, long before the time of the demand and refusal on 2d of May. The plaintiff produced the writ, which appeared to be sued out after the 2d of May. Verdict for the plaintiff, and the point reserved was, whether the writ was admissible. The court were of opinion that the writ was rightly admitted, and Lord Mansfield said, if there be no special memorandum, the bill by fiction of law relates to the first day of the term. But fictions of law hold only in respect of the ends and purposes for which they were invented; when they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may shew the truth. The bill is not the commencement of the suit; the writ is: and being after the time to which the bill relates, shews there should have been a special memorandum. *Morris v. Pugh.* 3 Burr. 1243.

It has been determined, in actions upon penal statutes, which must be brought within a limited time, that the plaintiff may shew the true commencement of the prosecution contrary to the fiction. *Ibid.*

Declarations in Assumpsit,

The FORM of.

MICHAELMAS Term, in the 32d year of the reign of King George the Third.

*Indebitatus
assumpsit for
work and labour
and materials
found, by bill.*

Stormont and Way.
London (ss.) A. B. complains of C. D. being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea of trespass on the case, For that whereas the said C. D. on the 1st day of November, in the year of our Lord 1791, to wit, at London aforesaid, in the parish of St. Mary le Bow, in the ward of Cheap, was indebted to the said A. B. in twenty pounds of lawful money of Great Britain, for the work and labour, care and diligence, of the said A. B. by him the said A. B. before that time done, performed, and bestowed, in and about the business of the said C. D. and for the said C. D. and at his special instance and request; and for divers materials, and other necessary things, used and applied in and about that work, by the said A. B. before that time found and provided for the said C. D. at his like instance and request. And being so indebted, he the said C. D. in consideration thereof, afterwards, to wit, on the same day and year, at London aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said A. B. to pay him the said sum of money, when he should be thereto afterwards requested.

*Quantum meruit
thereon.*

And whereas, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, in consideration that the said A. B. at the like instance and request of the said C. D. had before that time done, performed, and bestowed, other his work and labour, care and diligence, in and about other the business of the said C. D. and for the said C. D. and had before that

time,

time, also at the like request of the said *C. D.* found and provided divers other materials, and necessary things, used and applied in and about that work, he the said *C. D.* then and there undertook, and faithfully promised the said *A. B.* to pay him so much money, as he therefore reasonably deserved to have of the said *C. D.* when he the said *C. D.* should be thereto afterwards requested; and the said *A. B.* avers, that he therefore reasonably deserved to have of the said *C. D.* other 20*l.* of like lawful money, to wit, at *London* aforesaid, in, &c. whereof the said *C. D.* afterwards, to wit, on the same day and year aforesaid, there had notice.

And whereas the said *C. D.* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. was indebted to the said *A. B.* in other 20*l.* of like lawful money, for the work and labour, care and diligence, of the said *A. B.* by him the said *A. B.* before that time done, performed, and bestowed, in and about other the business of the said *C. D.* and for the said *C. D.* at his special instance and request; and being so indebted, he the said *C. D.* in consideration thereof, afterwards, to wit, on the same day and year, at *London* aforesaid, in, &c. undertook, and then and there faithfully promised the said *A. B.* to pay him the said last mentioned sum of money, when he should be thereto afterwards requested. And whereas afterwards, to wit, on the same day and year, at *London* aforesaid, in, &c. in consideration that the said *A. B.* at the like special instance and request of the said *C. D.* had before that time done, performed, and bestowed, other his work and labour, care and diligence, in and about other the business of the said *C. D.* and for the said *C. D.* he the said *C. D.* then and there undertook, and faithfully promised the said *A. B.* to pay him so much money as he therefore reasonably deserved to have of the said *C. D.* when he the said *C. D.* should be thereto afterwards requested; and the said *A. B.* avers, that he therefore reasonably deserved to have of the said *C. D.* other 20*l.* of like lawful money, to wit,

Indebitatus
assumpsit for
work and labour
generally.

Quantum meruit
thereon.

For goods sold
and delivered.

Quantum meruit
thereon.

Money laid out.

Money lent.

wit, at *London* aforesaid, in, &c. whereof the said *C. D.* afterwards to wit, on the same day and year aforesaid, there had notice. *And whereas* the said *C. D.* afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. was indebted to the said *A. B.* in other 20*l.* of like lawful money, for divers goods, wares and merchandizes, by the said *A. B.* before that time sold and delivered to the said *C. D.* and at his special instance and request; and being so indebted, he the said *C. D.* in consideration thereof (as in the former). *And whereas* afterwards, to wit, on the same day and year, at *London* aforesaid, in, &c. in consideration that the said *A. B.* at the like instance and request of the said *C. D.* had, before that time, sold and delivered to the said *C. D.* divers other goods, wares, and merchandizes; he the said *C. D.* then and there undertook, and faithfully promised the said *A. B.* to pay him so much money as he therefore reasonably deserved to have of the said *C. D.* when he the said *C. D.* should be thereto afterwards requested; and the said *A. B.* avers, that he therefore reasonably deserved to have of the said *C. D.* other 20*l.* of like lawful money, to wit, at *London* aforesaid, in, &c. whereof the said *C. D.* afterwards, to wit, on the same day and year there had notice. *And whereas* the said *C. D.* afterwards, to wit, on the same day and year, at *London* aforesaid, in, &c. was indebted to the said *A. B.* in other 20*l.* of like lawful money for other money by the said *A. B.* before that time laid out, expended, and paid for the said *C. D.* and at his special instance and request, and being so indebted, he the said *C. D.* in consideration thereof, afterwards, to wit, on the day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *A. B.* to pay him the said last mentioned sum of money when he should be thereto afterwards requested. *And whereas* the said *C. D.* afterwards, to wit, on the same day and year, at *London* aforesaid, in, &c. was indebted to the said *A. B.* in other 20*l.* of like

like lawful money, for money by the said *A. B.* before that time lent and advanced to the said *C. D.* and at his like request; and being so indebted, he the said *C. D.* in consideration thereof, &c. *And* Money had and
whereas the said *C. D.* afterwards, to wit, on the received.
 same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *A. B.* in other 20*l.* of like lawful money, for money by the said *C. D.* before that time had and received to the use of the said *A. B.* and being so indebted, he the said *C. D.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at, &c. *And whereas* the said *C. D.* afterwards, Account stated,
 to wit, on the same day and year, at *London* aforesaid, in, &c. accounted together with the said *A. B.* of and concerning divers other sums of money, before that time due and owing from the said *C. D.* to the said *A. B.* and then being in arrear and unpaid, and upon that occasion, the said *C. D.* was then and there found in arrear and indebted to the said *A. B.* in a large sum of money, to wit, in the sum of 10*l.* of like lawful money, and being so found in arrear and indebted to the said *A. B.* he the said *C. D.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. undertook, and faithfully promised the said *A. B.* to pay him the said last-mentioned sum of money, when he should be there-
 to afterwards requested. Yet the said *C. D.* not Conclusion.
 regarding his aforesaid several promises and undertakings, so by him made in manner and form aforesaid, by contriving, and fraudulently intending, craftily and subtilly to deceive and defraud the said *A. B.* in this behalf, hath not yet paid the said several sums of money, or any part thereof, to the said *A. B.* (although so to do he the said *C. D.* was requested by the said *A. B.* afterwards, to wit, on the same day and year aforesaid, and often afterwards, to wit, at *London* aforesaid, in, &c.) but he to do this hath hitherto wholly refused, and still refuses,

fuses, to the said *A. B.* his damage of 20*l.* and therefore he brings his suit, &c.

John Doe,

Pledges to prosecute, and

Richard Roe,

Declaration for
work and labour
with horses,
carts, and car-
riages, by plain-
tiff and his ser-
vant, by origi-
nal.

Middlesex, I C. D. late of *Westminster*, &c. yeoman,
to wit. I was attached to answer *A. B.* in a
plea of trespass on the case, and whereupon the said
A. B. by *I. K.* his attorney complains, For that
whereas the said *C. D.* on the 1st day of November,
in the year of our Lord 1790, to wit, at *Westminster*,
in the said county, was indebted to the said *A. B.* in
20*l.* of lawful money of Great Britain, for the work
and labour, care and diligence of the said *A. B.* by
the said *A. B.* and his servants, and with his horses,
carts, and carriages before that time done, perform-
ed, and bestowed, in and about the business of the said
C. D. and for the said *C. D.* and at his instance
and request; and being so indebted, he the said
C. D. in consideration, &c. And whereas afterwards,
to wit, on the same day and year, at *Westminster*
aforesaid, in the county aforesaid, in consideration
that the said *A. B.* at the like instance and request
of the said *C. D.* had before that time by himself and
his servants, and with his horses, carts, and car-
riages, done, performed, and bestowed, other his
work and labour, care, and diligence, in and about
other the business of the said *C. D.* and for the said
C. D. he the said *C. D.* then and there undertook,
and faithfully promised the said *A. B.* to pay him so
much money as he therefore reasonably deserved to
have of the said *C. D.* when he the said *C. D.* should
be thereto afterwards requested; and the said *A. B.*
avers, that he therefore reasonably deserved to have
of the said *C. D.* other 20*l.* of like lawful money,
to wit, at *Westminster* aforesaid, in the county afore-
said, whereof the said *C. D.* afterwards, to wit, on
the same day and year there had notice, "add two
" counts for work and labour generally, and money laid
" out." Yet the said *C. D.* not regarding his afore-
said several promises and undertakings, so by him
made

Quantum meruit.

made in manner and form aforesaid ; but contriving, and fraudulently intending, craftily and subtilly, to deceive and defraud the said *A. B.* in this respect, hath not yet paid the said several sums of money, or any part thereof, to the said *A. B.* (although so to do the said *C. D.* was requested by the said *A. B.* afterwards, to wit, on the same day and year aforesaid, and often afterwards, to wit, at *Westminster* aforesaid, in the county aforesaid) ; but he to do this hath hitherto wholly refused, and still refuses, to the said *A. B.* his damage of 40*l.* and therefore he brings his suit, &c.

N. B. Pledges being found on the original, therefore no pledges are put at the end of the declaration.

Middlesex, } *John Denn* complains of *Richard Fenn*, being in the custody, &c. For that whereas the said *Richard*, on the 6th day of October, in the year of our Lord 1791, to wit, at *Westminster*, in the said county, was indebted to the said *John* in 100*l.* of lawful money of Great Britain, for meat, drink, washing, lodging, and other necessary things, by the said *John* before that time found and provided for one *Thomas Fenn*, the infant son of the said *Richard*, and at his special instance and request ; and being so indebted, he the said *Richard*, in consideration thereof, &c. And whereas afterwards, to wit, on the same day and year, at *Westminster* aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had, before that time, found and provided for the said *Thomas Fenn*, the infant son of the said *Richard*, other meat, drink, washing, lodging, and other necessary things, he the said *Richard* then and there undertook, &c. Add a count for money laid out, money lent, and the common conclusion.

Declaration for board and lodging for defendant's son, by bill.

If for the defendant, say, for the said *Richard*.

Quantum meruit.

For the said *Richard*.

For the use and occupation of a certain messuage, and divers, to wit, 100 acres of land, with the appurtenances, situate and being in the parish of *St. Luke*, in the said county, by him the said *F.* and at his request, and by the permission of the said *C.* for a long

Declaration for the use and occupation of a house and land.

The parish in which the premises are situate.

Quantum meruit.

a long time, before then elapsed, had, held, used, occupied, possessed, and enjoyed, and being so indebted, &c. And whereas afterwards, to wit, on the same day and year aforesaid, at *W.* aforesaid, in the said county, in consideration that the said *C.* at the like request of the said *F.* had before that time permitted the said *F.* to have, hold, use, occupy, possess, and enjoy, a certain other messuage, and divers, to wit, 100 other acres of land, with the appurtenances, situate and being in, &c. and that the said *F.* according to that permission, had, held, used, occupied, possessed, and enjoyed the same for a long time before then elapsed, he the said *F.* then and there undertook, and faithfully promised the said *C.* &c. And the said *C.* avers, &c. *Add a count for money paid, and common conclusion.*

Declaration for
wharfage of
goods.

For the wharfage and warehouse-room of divers goods and merchandizes before that time deposited and kept by the said plaintiff, at and upon a certain wharf and premises of him the said plaintiff, for the said defendant, and at his special instance and request; and being so indebted, he the said defendant, in consideration thereof, &c. And whereas, &c. in consideration that the said plaintiff, at the like request of the said defendant, had before that time deposited and kept divers other goods and merchandizes, at and upon a certain other wharf and premises of him the said plaintiff for the said defendant, he the said defendant then and there undertook, &c.

Quantum meruit.

Declaration
against an exe-
cutrix, for goods
sold and deliver-
ed to testator, by
bill.

Some day in
testator's life-
time after cause
of action ac-
crued.

Oxfordshire (ss.) A. S. widow complains of *J. E.* widow, executrix of the last will and testament of *T. E.* deceased, being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself: *For that whereas* the said *T. E.* in his life-time, to wit, on the first day of *December*, in the year of our Lord 1790, to wit, at *Witney*, in the said county, was indebted to the said *A. S.* in 20*l.* of lawful money of *Great Britain*, for divers goods, wares, and merchandizes, by the said *A. S.* before that time sold and delivered to the said *T. E.* in

in his life-time, and at his special instance and request, and being so indebted, he the said *T. E.* in his life-time, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Witney* aforesaid, in the county aforesaid, undertook, &c.

And whereas afterwards, to wit, on the same day and year aforesaid, at *Witney* aforesaid, in, &c. in consideration that the said *A. S.* at the special instance and request of the said *T.* in his life-time, had before that time sold and delivered to the said *T.* in his life-time, divers other goods, wares, and merchandizes, he the said *T.* in his life-time then and there undertook, and faithfully promised the said *A. S.* to pay her so much money as she therefore reasonably deserved to have of the said *T.* when he the said *T.* should be thereto afterwards requested; and the said

A. S. avers, that she therefore reasonably deserved to have of the said *T.* in his life-time, other 20*l.* of like lawful money, to wit, at *Witney* aforesaid, in, &c. whereof the said *T.* in his life-time afterwards, to wit, on the same day and year aforesaid, there had notice. And whereas the said *T.* in his life-time,

afterwards, to wit, on the same day and year, at *Witney* aforesaid, in, &c. was indebted to the said *A.* in other 20*l.* of like lawful money, for money by the said *A.* before that time laid out, expended, and paid for the said *T.* and at his like special instance and request; and being so indebted, he the said *T.* in his life-time, in consideration thereof, &c. Yet

Conclusion.

the said *T.* in his life-time, and the said *J. E.* executrix as aforesaid, since his death; not regarding the said several promises and undertakings of the said *T.* so by him made in manner and form aforesaid, but contriving, and fraudulently intending, craftily and subtilly, to deceive and defraud the said *A. S.* in this respect, have not, nor hath either of them yet paid the said several sums of money, or any part thereof, to the said *A. S.* (although so to do the said *T.* in his life-time, to wit, on the same day and year aforesaid, and the said *J. E.* executrix as aforesaid, since the death of the said *T.* to wit, on the first day

of

Quia: non

of February, in the year of our Lord 1791, and often afterwards, were severally requested by the said *A. S.* to wit, at *Witney* aforesaid, in, &c.) but they to do this have, and each of them hath, hitherto wholly refused, and the said *J. E.* still doth refuse to the said *A. S.* her damage of 30*l.* and therefore she brings her suit, &c.

Pledges to prosecute,

John Doe,

and

Richard Roe.

At the suit of
an executor for
goods sold and
delivered, by bill.

Middlesex, } *Daniel Morgan*, executor of the last
to wit. } will and testament of *Thomas Morgan*,

deceased, complains of *John Dutton*, being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself, of a plea of trespass on the case: For that whereas the said *John*, on the first day of *November*, in the year of our Lord 1790, to wit, at *Westminster*, in the said county, was indebted to the said *Thomas Morgan* in his life-time, in 100*l.* of lawful money of *Great Britain*, for divers goods, wares, and merchandizes, by the said *Thomas* in his life-time, before that time sold and delivered to the said *John Dutton*, and at his special instance and request; and being so indebted, he the said *John Dutton*, in consideration

Any day before
the cause of
action in testa-
tor's life-time.

Quantum meruit.

thereof, &c. And whereas afterwards, to wit, on, &c. at, &c. in consideration that the said *Thomas* in his life-time, at the like instance and request of the said *John Dutton*, had before that time sold and delivered to the said *John Dutton* divers other goods, wares, and merchandizes, he the said *John Dutton* undertook, and faithfully promised the said *Thomas* in his life-time, to pay him so much money as he therefore reasonably deserved to have of the said *John Dutton*, when he the said *John Dutton* should be thereto afterwards requested; and the said *Daniel*, executor as aforesaid, avers, that the said *Thomas*, in his life-time, therefore reasonably deserved to have of the said *John Dutton* other 100*l.* of like lawful money, to wit, at *Westminster* aforesaid, whereof the said *John Dutton*, afterwards, to wit, on the

day and year aforesaid, there had notice. *Add a count for money laid out.* Yet the said *John Dutton* not regarding, &c. but contriving, &c. to deceive and defraud the said *Thomas* in his life-time, and the said *Daniel*, executor as aforesaid, since his death, in this respect hath not yet paid to them, or either of them, the said several sums of money, or any part thereof (although so to do the said *John Dutton* was requested by the said *Thomas* in his life-time oftentimes, and by the said *Daniel* executor as aforesaid, since his death, to wit, on the 7th day of *December*, in the year aforesaid, and often afterwards, to wit, at *Westminster* aforesaid), but he to do this hath hitherto wholly refused, and still refuses to pay the same or any part thereof to the said *Daniel*, executor as aforesaid, To the said *Daniel*, executor as aforesaid, his damage of 200*l.* and therefore he brings his suit, &c.

Conclusions

And he brings into court here the letters testamentary of the said *Thomas*, whereby it appears to the court here, that the said *Daniel* is the executor of the last will and testament of the said *Thomas*, and hath the administration thereof, &c. *Add pledges.*

Profert in curia.

N. B. The form is exactly similar against an executor *de son tort*.

London, (ss.) Joseph Yates, late of *London*, merchant, was attached to answer *John Doe*, administrator of all and singular the goods, chattels, and credits which were of *Alexander Priest* deceased, at the time of his death, who died intestate, and whereupon the said *Joseph*, by *J. K.* his attorney, complains: For that whereas the said *Joseph*, on the 1st day of *November*, in the year of our Lord 1788, to wit, at *London* aforesaid, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, was indebted to the said *Alexander*, in his life-time, in 50*l.* of lawful money of *Great-Britain*, for divers goods, wares, and merchandizes, &c. (same as in the declaration for an executor, only calling him administrator): Yet, &c. hath not yet paid the said

At the suit of an administrator, by original.

said several sums of money, or any part thereof, to the said *Alexander* in his life-time, or to the said *John*, since his death (to which said *John*, administration of all and singular the goods, chattels, and credits, which were of the said *Alexander* at the time of his death, after the death of the said *Alexander*, to wit on the first day of *October*, in the year of our Lord 1788, at *London*, &c. by *A.* by Divine Providence archbishop of *Canterbury*, primate of all *England*, and metropolitan, in due form of law was granted); although so to do the said *Joseph* was requested by the said *Alexander* in his life-time oftentimes, and by the said *John*, administrator as aforesaid, since his death, to wit, on the day and year last aforesaid, and often afterwards, to wit, at *London* aforesaid, in, &c. but he to do this hath hitherto wholly refused, and still refuses to pay the same or any part thereof to the said *John*, as administrator as aforesaid, To the said *John*, administrator as aforesaid, his damage of 100*l.* and therefore he brings his suit, &c.

Profert hic in curia.

Declaration as assignees of a bankrupt, by bill.

Some day after the cause of action accrued, and before the bankruptcy.

And he brings into court here the letters of administration of the said archbishop, which sufficiently prove to the court here the granting thereof in form aforesaid, the date whereof is on the day and year aforesaid, &c.

London, } *Richard Price*, and *David Skeggs*, al-
to wit. } signees of the estate and effects of *Luke Knowles*, a bankrupt, according to the force, form, and effect of the several statutes made concerning bankrupts, complain of *Joseph Love* being, &c. For that whereas the said *Joseph*, on the fifth day of *December* in the year of our Lord 1790, to wit, at *London* aforesaid, in the parish of *St. Mary-le Bow*, in the ward of *Cheap*, was indebted to the said *David*, before he came a bankrupt, in 20*l.* of lawful money of *Great Britain*, for divers goods, wares, and merchandizes, by the said *Luke* before that time sold and delivered to the said *Joseph*, and at his special instance and request, and being so indebted, he the said *Joseph*, in consideration thereof, afterwards,

wards, to wit, on, &c. at, &c. undertook and faithfully promised the said *Luke*, before he became a bankrupt, to pay him the said sum of money, when he should be thereto afterwards requested: *And Quantum meruit.* whereas afterwards, to wit, on, &c. at, &c. in consideration that the said *Luke*, before he became a bankrupt, had, &c. as in the former one. "And Averment.
" the said *Richard* and *David*, assignees as aforesaid, aver, that the said *Luke*, before he became a bankrupt, therefore reasonably deserved to have, " &c." Add the usual counts.

Yet the said *Joseph* not regarding, &c. but contriving, &c. hath not yet paid the said several sums of money, or any part thereof, to the said *Richard* and *David*, assignees as aforesaid, since he became bankrupt, or to either of them (although so to do the said *Joseph* was requested by the said *Luke*, before he became a bankrupt, oftentimes, and by the said *Richard* and *David*, assignees as aforesaid, since he became bankrupt, to wit, on the 30th day of *December*, in the year aforesaid, and often afterwards, to wit, at *London* aforesaid, in, &c.), but he to do this hath hitherto wholly refused, and still refuses to pay the same or any part thereof, to the said *Richard Price* and *David*, assignees as aforesaid, To the said *Richard Price* and *David*, assignees as aforesaid, their damage of 100*l.*; and therefore they bring their suit, &c. Add pledges, &c. Conclusion.

Middlesex, } *John Doe* complains of *James Roe*, Declaration on a
to wit. } being in the custody of the marshal of promissory note,
the *Marshalsea* of our lord the now king, before the payee against
king himself; *For that whereas* the said *James*, on drawer, by bill.
the 1st day of *May*, in the year of our Lord 1790,
to wit, at *Westminster*, in the county aforesaid,
made his certain note in writing, commonly called
a promissory note, his own proper hand being there-
to subscribed, bearing date the same day and year
aforesaid, and then and there delivered the said note
to the said *John*; and thereby, six weeks after the
date thereof, promised to pay to the said *John*, by
the name of *Mr. Doe*, or order, 20*l.* for value re-
ceived;
O 2

ceived; by reason whereof, and by force of the statute in such case made and provided, the said *James* became liable to pay to the said *John* the said sum of money mentioned in the said note, according to the tenor and effect of the said note; and being so liable, he the said *James*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook and faithfully promised the said *John*, to pay him the said sum of money mentioned in the said note, according to the tenor and effect of the said note. *And whereas* the said *James*, afterwards, to wit, on the 15th day of *June*, in the year aforesaid, at *Westminster* aforesaid, was indebted to the said *John* in 30*l.* of lawful money, &c. add counts for the consideration of the note, and the common conclusion. Add pledges. When you declare on a note, bill, bond, or other writing, the day is material, and if mistated the plaintiff will be non-suited.

Indorsee against the indorser, on a note, the drawer refusing payment, by original.

London, (ss.) S. E. late of *London*, merchant, was attached to answer *F. R.* in a plea of trespass on the case, &c.; and whereupon the said *F. R.* by *R. L.* his attorney, complains, *For that whereas* one *E. H.* on the 3d day of *May*, in the year of our Lord 1790, to wit, at *London* aforesaid, in the parish of *Saint Mary le-Bow*, in the ward of *Cheap*, made her certain note in writing, commonly called a promissory note, her own proper hand being thereto subscribed, bearing date the same day and year aforesaid, and then and there delivered the said note to the said *S.* by which said note she the said *E. H.* promised to pay to the said *S.* by the name of *Mr. S. E.* or order, four months after the date thereof, the sum of 95*l.* for value received; and the said *S.* to whom or to whose order the payment of the said sum of money in the said note specified, was by the said note to be made, after the making thereof, and before the payment of the said sum of money in the said note specified, or of any part thereof, to wit, on the same day and year aforesaid, at *London* aforesaid, &c. indorsed the said note, his own proper hand being

being to such indorsement thereon subscribed, by which said indorsement he the said *S. E.* ordered and appointed the said sum of money in the said note specified to be paid to the said *F.* and then and there delivered the said note so indorsed to the said *F.* And the said *F.* avers that he the said *F.* did afterwards, to wit, on the 6th day of *September*, in the year aforesaid, at *London* aforesaid, &c. shew and present the said note so indorsed as aforesaid to the said *E. H.* for payment thereof, and the said *E. H.* then and there had notice of the said indorsement so made thereon as aforesaid, and was then and there requested to pay the said sum of money therein specified to him the said *F.* but that the said *E. H.* then and there wholly refused and neglected so to do, of all which said premises the said *S.* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, had notice, by means whereof, and by force of the statute in such case made and provided, he the said *S.* became liable to pay to the said *F.* the said sum of money in the said note specified, when he should be thereto afterwards requested, and being so liable, he the said *S.* in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at *London* aforesaid, &c. undertook, and faithfully promised the said *F.* to pay him the said sum of money in the said note specified, when he should be thereto afterwards requested: *And whereas* the said *S.* afterwards, to wit, on the same day and year last aforesaid, at *London* aforesaid, in, &c. was indebted, &c. *Aid counts for the consideration of indorsing the note, and common conclusion; no pledges are added*

London, (ss.) T. C. late of *London*, merchant, Payees partners was attached to answer *J. P.* and *E. B.* in a plea against the acceptor on a bill of exchange, by of trespass on the case, &c. and whereupon the said *J. P.* and *E. B.* by *A. D.* their attorney, complain, original, For that *whereas*, at the several times hereafter mentioned, the said *J. P. E. B.* and *J. C.* and one *T. G.* were persons residing, trading, and using com-

commerce within this kingdom, to wit, at *London* afore-
 said, in the parish of *Saint Mary-le Bow*, in
 the ward of *Chicope*. And the said *J. P.* and *E. B.*
 at those several times, were partners and joint
 dealers together in their trade and commerce, to
 wit, at *London* afore-
 said, in the parish and ward
 afore-
 said. And whereas the said *J. P.* *E. B.* *C. T.*
 and *T. G.* being so resident, trading, and using
 commerce as afore-
 said, and the said *J. P.* and
E. B. on being partners and joint dealers together
 as afore-
 said, the said *T. G.* on the 29th day of Sep-
 tember, in the year of our Lord 1790, to wit, at
London afore-
 said, in the parish and ward afore-
 said, according to the usage and custom of merchants
 from time immemorial used and approved of within
 this kingdom, made his certain bill of exchange in
 writing, his own proper hand being thereto sub-
 scribed, bearing date the day and year afore-
 said, and then and there directed the said bill to the said
T. C. by the name and addition of *Mr. T. C.* mer-
 chant, in *Milk-street, London*, and thereby required
 the said *T. C.* three months after the date of the
 said bill, to pay to the said *J. P.* and *E. B.* by their
 names, stile and firm of *Messrs. J. P. and E. B.*
 or order, 80*l.* for value received; and the said *T. G.*
 then and there delivered the said bill of exchange to
 the said *J. P.* and *E. P.*; which said bill of ex-
 change the said *T. C.* afterwards, to wit, on the day
 and year afore-
 said, at *London* afore-
 said, in the pa-
 rish and ward afore-
 said, upon sight thereof ac-
 cepted, according to the said usage and custom of
 merchants, and by reason thereof, and according to
 the said usage and custom of merchants, the said
T. C. became liable to pay to the said *J. P.* and
E. B. the said sum of 80*l.* in the said bill of ex-
 change specified, according to the tenor and effect
 of the said bill of exchange, and of his said ac-
 ceptance thereof, and being so liable, he the said
T. C. in consideration thereof, afterwards, to wit,
 on the same day and year afore-
 said, at *London*
 afore-

aforesaid, in the parish and ward aforesaid, undertook and faithfully promised the said J. P. and A. B. to pay them the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of his acceptance thereof. *And whereas the said J. C. afterwards, to wit, on, &c. at, &c. Add a count for money had and received, and common conclusion, no pledges.*

London, (ss.) T. W. and W. K. complain of J. R. being in the custody of the marshal, &c. For that whereas certain persons carrying on trade and commerce by and under the names, style, and firm of S. F. and Co. on the 3d day of October, in the year of our Lord 1790, to wit, at London aforesaid, in the parish of St. Mary le Bow, in the ward of Cheap, according to the usage and custom of merchants, from time immemorial used and approved of within this kingdom, made their certain bill of exchange in writing, bearing date the same day and year aforesaid, and then and there directed the said bill of exchange to the said J. R. by the name, style, firm, and addition of Mr. J. R. and Company, merchants, Liverpool, and thereby required the said J. R. two months after date, to pay to their own order 106l. 5s. value received, and to place the same to account of the said S. F. and Co. which said bill of exchange he the said J. R. afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, upon sight thereof accepted, according to the said usage and custom of merchants, payable in London; and the said S. F. and Co. to whose order the payment of the said sum of money mentioned in the said bill was to be made, afterwards, and before the payment of the said sum of money mentioned in the said bill, or of any part thereof, to wit, on the same day and year aforesaid, at London aforesaid, in, &c. indorsed the said bill, according to the said usage and custom of merchants, and by that in-

Indorsee partners against the acceptor on a bill drawn by partners, payable to their own order, by bill.

dorsement ordered and appointed the contents of the said bill to be paid to the said *T. W.* and *W. K.* and then and there delivered the said bill so indorsed to the said *T. W.* and *W. K.* of which said indorsement so made on the said bill as aforesaid, he the said *J. R.* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. had notice; by means whereof, and according to the said custom, usage, and law of merchants, the said *J. R.* became liable to pay to the said *T. W.* and *W. K.* the said sum of money mentioned in the said bill, according to the tenor and effect of the said bill, and of his said acceptance thereof, and of the said indorsement so made thereon as aforesaid; and being so liable, he the said *J. R.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. undertook and then and there faithfully promised the said *T. W.* and *W. K.* to pay them the said sum of money mentioned in the said bill, according to the tenor and effect of the said bill, and of his said acceptance thereof, and of the said indorsement so made thereon as aforesaid. *Add a count for money had and received, and common conclusion. Add pledges.*

Declaration for
an attorney's
bill,

Middlesex, (ss.) E. A. gentleman, one of the attornies of the court of our lord the king, before the king himself, being present here in court in his own proper person, according to the liberties and privileges of the same court for such attornies and other officers of the court aforesaid, from time immemorial used and approved of in the said court, complains of *L. H.* being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself: For, *That whereas* the said *L. H.* on the 19th day of *May*, in the year of our Lord 1785, at *Westminster*, in the county of *Middlesex*, was indebted to the said *E. A.* in the sum of 300*l.* of lawful money of *Great Britain*, for work and labour, care, diligence, and attendance, as an attorney and solicitor, before then done and performed

formed by the said *E. A.* upon the retainer, and at the special instance and request of the said *L. H.* in and about the prosecuting, defending, and soliciting of divers causes, suits, and businesses, for the said *L. H.* and for fees due, and of right payable to the said *E. A.* in that respect; and being so indebted, he the said *L. H.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in the county aforesaid, undertook, and then and there faithfully promised the said *E. A.* that he the said *L. H.* would well and truly pay to the said *E. A.* the said sum of 300*l.* when he the said *L. H.* should be thereunto afterwards requested. *And whereas also, Quantum meruit,* afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in the county aforesaid, in consideration that the said *E. A.* upon the retainer, and at the like instance and request of the said *L. H.* had before that time done and performed other work and labour, care, diligence, and attendance, as an attorney and solicitor in and about the prosecuting, defending, and soliciting divers other causes, suits, and businesses, for the said *L. H.* he the said *L. H.* undertook, and then and there faithfully promised the said *E. A.* that he the said *L. H.* would well and truly pay the said *E. A.* so much money as he the said *E. A.* should reasonably deserve to have of the said *L. H.* when he the said *L. H.* should be thereunto afterwards requested. And the said *E. A.* in fact saith, that he therefore reasonably deserved to have of the said *L. H.* other 300*l.* of like lawful money, to wit, at *Westminster* aforesaid, in the county aforesaid; whereof the said *L. H.* afterwards, to wit, on the day and year aforesaid, there had notice. *And whereas also,* the said *L. H.* afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in the county aforesaid, was indebted to the said *E. A.* in other 300*l.* of like lawful money, for the work and labour, care and diligence of the said *E. A.* by the said *E. A.* before that time done, performed, and bestowed

In deb. off. for
drawing writings,
&c.

*Quant. meruit
thereon.*

Conclusion.

bestowed in and about the drawing, copying, and ingrossing of divers deeds and writings, and giving his attendance in and about other the business of the said *L. H.* and for the said *L. H.* at his like instance and request; and being so indebted, he the said *L. H.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in the county aforesaid, undertook, and to the said *E. A.* then and there faithfully promised to pay him the said 300*l.* last mentioned, when he the said *L. H.* should be thereunto afterwards requested. *And whereas also*, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in the county aforesaid, in consideration that the said *E. A.* had, before that time, at the like instance and request of the said *L. H.* done, performed, and bestowed other work and labour, care and diligence, in and about the drawing, copying, and ingrossing of divers other deeds and writings, and giving his attendance in and about other the business of the said *L. H.* and for the said *L. H.* he the said *L. H.* undertook, and to the said *E. A.* then and there faithfully promised to pay him so much money as he therefore reasonably deserved to have of the said *L. H.* when he the said *L. H.* should be thereunto afterwards requested; and the said *E. A.* avers, that he therefore reasonably deserved to have of the said *L. H.* other 300*l.* of like lawful money, to wit, at *Westminster* aforesaid, in the county aforesaid, whereof the said *L. H.* afterwards, to wit, on the same day and year aforesaid, there had notice. *Add a count for money lent and advanced, for money laid out and expended, for money had and received, and on account stated.* Nevertheless, the said *L. H.* not regarding his said several promises and undertakings by him made in manner and form aforesaid, by contriving, and fraudulently intending, craftily and subtilly to deceive and defraud the said *E. A.* in this respect, hath not yet paid the said several sums of money, or any part thereof, to the said *E. A.* (although so to do, the said *L. H.* afterwards,

wards, to wit, on the day and year aforesaid, and often afterwards, at *Westminster* aforesaid, in the county aforesaid, by the said *E. A.* was requested), but to pay the same, or any part thereof, to the said *E. A.* the said *L. H.* hath hitherto wholly refused, and still doth refuse, to the damage of the said *E. A.* of 300*l.* and therefore he brings his suit, &c. Add pledges.

Declarations in Debt.

Trinity Term, in the 31st year of the reign of King George the Third. *Stormont and Way.*

London, (ss.) A. B. complains of *C. D.* being On bond, in the custody of the marshal, &c. of a plea, that obligee against he render to him, the said *A. B.* 800*l.* of lawful obligor. money of *Great Britain*, which he owes to, and unjustly detains from him; and whereupon the said *A. B.* by *E. F.* his attorney, complains, *For that whereas* the said *C. D.* on the 20th day of *April*, The exact date of the bond. in the year of our Lord 1790, to wit, at *London* aforesaid, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, by his certain writing obligatory, sealed with the seal of the said *C. D.* and now shewn to his majesty's court here, the date whereof is on the day and year aforesaid, acknowledged himself to be then and there held and firmly bound unto the said *A. B.* in the sum of 800*l.* to be paid to the said *A. B.* when he should be thereto afterwards requested. Yet the said *C. D.* (although often requested, &c.) hath not yet paid the said sum of 800*l.* above demanded, or any part thereof, to the said *A. B.* but to pay the same, or any part thereof, to the said *A. B.* he the said *C. D.* hath hitherto wholly refused, and still doth refuse to the said *A. B.* his damage of 10*l.* and therefore he brings his suit, &c. Pledges, &c.

London, (ss.) G. F. late of *London*, grocer, was Declaration by summoned to answer *J. W.* and *S.* his wife, of a original, upon a bond given to the wife whilst plea, that he render to the said *J. W.* and *S.* the sum sole at of husband and wife.

sum of 100*l.* of lawful money of *Great Britain*, which he owes to, and unjustly detains from them; and whereupon the said *J. W.* and *S.* by *A. B.* their attorney, complain, *For that whereas* the said *G. F.* on the 21st day of *November*, in the year of our Lord 1790, to wit, at *London* aforesaid, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, by his certain writing obligatory, sealed with his seal, became held and firmly bound to the said *S.* by the name of *S. H.* spinster, while she was *sole*, and before her intermarriage with the said *J. W.* in the sum of 100*l.* of good and lawful money of *Great Britain*, to be paid to the said *S.* when he the said *G. F.* should be thereunto afterwards requested; yet the said *G. F.* (although often requested) hath not yet paid the said sum of 100*l.* or any part thereof, to the said *S.* while she was *sole*, and before her intermarriage with the said *J. W.* or to the said *J. W.* and *S.* since their intermarriage, or to either of them, but he to pay the same to the said *J. W.* and *S.* or to either of them, hath wholly refused, and still doth refuse; wherefore the said *J. W.* and *S.* his wife say, they are injured, and have sustained damage to the value of 10*l.*; and therefore they bring their suit, &c. And they bring here into court the said writing obligatory, sealed with the seal of the said *G. F.* which gives sufficient evidence of the debt aforesaid, in form aforesaid, the date whereof is the day and year above said, &c.

Proferri in cur.

Declaration on
bond at the suit
of assignees of
bankrupt, by
original.

Middlesex, to wit, *S. F.* late of, &c. was summoned to answer *R. T.* and *J. A.* assignees of the estate and effects of *J. M.* a bankrupt, according to the force, form, and effect of the several statutes made concerning bankrupts, of a plea, that he render to them the sum of 1420*l.* of good and lawful money of *Great Britain*, which he owes to, and unjustly detains from them, &c. and whereupon the said *R. T.* and *J. A.* by *J. B.* their attorney, complain, *That whereas* the said *S. F.* before the said *J. M.* became a bankrupt, to wit, on the 8th day of *January*, in the year of our Lord 1791, at *Westminster*,
in

in the said county, by his certain writing obligatory, sealed with his seal, acknowledged himself to be held and firmly bound to the said *J. M.* in the sum of 1420*l.* of good and lawful money of *Great Britain*, to be paid to the said *J. M.* or his assigns, when he the said *S. F.* should be thereunto afterwards requested; Yet the said *S. F.* (although often requested, &c.) hath not paid the said sum of 1420*l.* above demanded, or any part thereof, to the said *J. M.* before he became a bankrupt, or to the said *R. T.* and *J. A.* assignees as aforesaid, since the said *J. M.* became a bankrupt, or to either of them, but he to pay the same, or any part thereof, hath hitherto wholly refused, and still doth refuse to pay the same, or any part thereof, to the said *R. T.* and *J. A.* assignees as aforesaid, or either of them; wherefore the said *R. T.* and *J. A.* assignees as aforesaid, say, they are injured, and have sustained damage to the value of 10*l.* and therefore they bring their suit, &c. And the said *R. T.* and *J. A.* assignees as aforesaid, now bring here into court the said writing obligatory, sealed with the seal of the said *S. F.* which gives sufficient evidence of the debt aforesaid, in form aforesaid, the date whereof is the same day and year in that behalf above-mentioned, &c.

Conclusion.

Profert in curia.

London, to wit, *J. C.* late of, &c. and *S. B.* late of, &c. executors of the last will and testament of *H. F.* widow, deceased, who was in her lifetime executrix of the last will and testament of *R. F.* her then late husband deceased, were summoned to answer *T. L.* Esq. of a plea that they render to the said *T.* 600*l.* of lawful money of *Great Britain*, which they unjustly detain from him, &c. and whereupon the said *T.* by *J. A.* his attorney, says, That whereas the said *K.* by the name of *R. F.* the younger, in his life-time, to wit, on the 18th day of *July*, in the year of our Lord 1791, at *London*, to wit, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, by his certain writing obligatory, acknowledged himself to be held and firmly bound to the said *T.* in the

Debt upon a
bond against the
executors of an
executrix of the
obligor, by
original.

the aforesaid 600*l.* to be paid to the said *T.* when he the said *R.* in his lifetime should be thereunto required: Yet the said *R.* in his life-time, and the said *H.* in her life-time, after the death of the said *R.* and the said *J.* and *S.* or either of them, after the death of the said *H.* (although often requested), have not rendered, neither hath any of them rendered the aforesaid 600*l.* to the said *T.* but the said *R.* in his life-time, and the said *H.* in her life-time, after the death of the said *R.* have denied to render the same to the said *T.* and the said *J.* and *S.* after the death of the said *H.* do yet deny to render the same to the said *T.* and unjustly detain the same; whereupon the said *T.* saith, that he is injured, and hath damage to the value of 20*l.* and therefore he brings suit, &c. And the said *T.* brings here into court the said writing obligatory, which testifies the debt aforesaid, in form aforesaid, the date whereof is the day and year aforesaid, &c.

The like acts of
executors, by
bill.

London, (ss.) C. P. and R. S. executors of the last will and testament of *P. P.* Esquire, deceased, complain of *J. T.* being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself, of a plea, that he render to them 2400*l.* of lawful money of *Great Britain*, which he unjustly detains from them; For that whereas the said *J. T.* on the 25th day of *March*, in the year of our Lord 1791, at *London* aforesaid, to wit, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, by his certain writing obligatory, sealed with the seal of the said *J. T.* and now shewn to his Majesty's court here, the date whereof is the day and year aforesaid, acknowledged himself to be held and firmly bound to the said *P. P.* in his life-time, in the said sum of 2400*l.* above demanded, to be paid to the said *P. P.* his executors, administrators, or assigns, when he the said *J. T.* should be thereto afterwards requested; nevertheless the said *J. T.* (although often requested, &c.) hath not paid the said sum of 2400*l.* or any part thereof, to the said *P. P.* in his life-time, nor to the said *C. P.* and *R. S.*

R. S. executors as aforesaid, since the decease of the said *P. P.* but to pay the same, or any part thereof, to the said *P. P.* in his life-time, or to the said *C. P.* and *R. S.* executors as aforesaid, since the decease of the said *P. P.* he the said *J. T.* hath hitherto wholly refused, and still doth refuse, To the said *C. P.* and *R. S.* executors as aforesaid, their damage of 30*l.* and therefore they bring suit, &c. And they bring into court here the letters testamentary of the said *P. P.* by which it sufficiently appears to the court here, that the said *C. P.* and *R. S.* are the executors of the last will and testament of the said *P. P.* deceased; and have the administration thereof, &c. Pledges, &c.

Prof. in cur.

Middlesex, to wit, *J. B.* and *G. B.* complain of *R. P.* being in the custody of, &c. of a plea, that he render to the said *J.* and *G.* 203*l.* 3*s.* of lawful money of *Great Britain*, which he owes to, and unjustly detains from them: For that whereas they the said *J.* and *G.* heretofore, (that is to say) in *Michaelmas* term, in the 30th year of the reign of our lord the now king, in the court of our said lord the king, before the king himself (the said court then and still being held at *Westminster*, in the county of *Middlesex*), by the consideration and judgment of the same court, recovered against the said *R.* a certain debt of 200*l.* and 63*s.* which were then and there in and by the said court adjudged to the said *J.* and *G.* for their damages which they had sustained, as well by occasion of the detaining of that debt, as for their costs and charges by them laid out about their suit in that behalf, whereof the said *R.* is convicted, as by the record and proceedings thereof, remaining in the said court of our said lord the king, before the king himself, at *Westminster* aforesaid, more fully appears, which said judgment still remains in the said court, in its full force, strength, and effect, and not in the least reversed, annulled, set aside, paid off, satisfied, or discharged; and the said *J.* and *G.* have not, nor hath either of them yet obtained execution of their

Declaration on a judgment recovered by the plaintiffs in *K. B.* in debt.

The term of which the judgment was signed.

If in assumpsit, say, For 40*l.* for their damages they had sustained, as well by means of the non-performance of certain promises, &c.

said

said judgment, whereby an action hath accrued to the said J. and G. to demand and have of the said R. the said 203*l.* 3*s.* above demanded; yet the said R. (although often requested, &c.) hath not yet paid the said 203*l.* 3*s.* or any part thereof, to the said J. and G. or to either of them, but he to do this hath hitherto wholly refused, and still refuses, to the said J. and G. their damage of 10*l.* and therefore they bring their suit, &c. Pledges, &c.

Declaration on a
non pros for the
defendant for
not declaring.

Middlesex, (ss.) Richard Fenn complains of *John Denn*, being, &c. of a plea, that he render to him 10*l.* of lawful money of *Great Britain*, which he owes to, and unjustly detains from him: *For that whereas* the said *Richard*, heretofore, to wit, in *Hilary Term*, in the 30th year of the reign of our lord the now king, in the court of our said lord the king, before the king himself (the said court then and still being held at *Westminster*, in the county of *Middlesex*), by the consideration and judgment of that court, recovered against the said *John* 33*s.* and 6*d.* which in the said court of our said lord the king, before the king himself, at *Westminster* aforesaid, were adjudged to the said *Richard*, according to the form of the statute in such case made and provided, for his costs and charges laid out by him about his defence of and in a certain plea then lately commenced by the said *John* against the said *Richard* in the same court, for that the said *John* had not prosecuted the said plea; whereof the said *John* was convicted, as by the record and proceedings thereof, remaining in the said court of our said lord the king, before the king himself, at *Westminster* aforesaid, more fully appears; which said judgment still remains in its full force, strength, and effect, not in the least reversed, annulled, set aside, paid off, or satisfied, and the said *Richard* hath not obtained any execution of the said judgment, whereby an action hath accrued to the said *Richard*, to demand and have of the said *John* the said 33*s.* and 6*d.* parcel of the said 10*l.* above demanded: And whereas the said *John*, afterwards, to wit, on the first day of *April* in the

the year of our lord 1790, at, &c. borrowed of the said *Richard* 8l. 6s. 6d. of like lawful money, residue of the said 10l. to be paid to the said *Richard*, when he the said *John* should be thereto afterwards requested, yet the said *John* (although often requested, &c.) hath not yet paid the said 10l. or any part thereof, to the said *Richard*, but he to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses, To the said *Richard* his damage of 10l. and therefore he brings his suit, &c. Pledges, &c.

London (s.) *Timothy Waker*, assignee of *William Picket*, Esquire, and *Thomas Skinner*, Esquire, sheriffs of the city of *London*, according to the form of the statute in such case made and provided, complains of *William Benson*, being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself, of a plea that he render to the said *Timothy*, assignee as aforesaid, 30l. of lawful money of *Great Britain*, which he owes to and unjustly detains from him: For that whereas he the said *Timothy*, on the 21st day of *March*, in the 24th year of the reign of our sovereign lord *George* the third, now king of *Great Britain*, &c. sued and prosecuted, out of the court of our lord the king before the king himself, the same court then and still being held at *Westminster*, in the county of *Middlesex*, against the said *William*, a certain^a writ of our said lord the king called a *latitat*, directed to the said sheriffs of *London*^b, by which said writ our said lord the king commanded the said sheriffs^c, that they should take the said *William*, if he should be found in their bailiwick, and keep him safely, so that they might have his body before the lord the king at *Westminster*, on *Wednesday* next after 15 days of *Easter* then next following, to answer the said *Timothy* in a plea of trespass, and also to a bill of the said *Timothy*, to be exhibited against the said *William* for 30l. on promises, according to the custom of his majesty's court, before his majesty, and that the said sheriffs should then have there that writ, which

Declaration by the assignee of the sheriff on a bail-bond against principal. This form will do for one in *Middlesex*, as altered in the margin, and say sheriff instead of sheriffs, precept instead of writ.

^a A certain precept of our lord the king called a bill of *Middlesex*

^b Whereby the sheriff was commanded.

^c Sheriff.

Sheriff of the
said county of
Middlesex.

The date of the
bond.

Sheriff of the
county of Mid-
dlesex,

Sheriff.

said writ, afterwards, and before the delivery thereof to the *sheriffs of the said city of London*, to be executed as is hereafter mentioned, was duly marked or indorsed for bail for 15*l.* by virtue of an affidavit of the cause of action, before then made and duly assised of record in the said court of our said lord the king, before the king himself, according to the form of the statute in such case made and provided, and which said writ so indorsed, afterwards, and before the return thereof, to wit, on the 27th day of *April*, in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was delivered to the said *William Picket* and *Thomas Skinner*, then *sheriffs of the said city of London*, in due form of law to be executed; by virtue of which said writ, the said *William Picket* and *Thomas Skinner*, then being sheriffs as aforesaid, afterwards, and before the return of the said writ, to wit, on the day and year last aforesaid, at *London* aforesaid, in, &c. and within their bailiwick, did take and arrest the said *William* by his body, and then and there had and detained him in their custody, at the suit of the said *Timothy* for the cause aforesaid; and the said *William* being so arrested and in custody of the said sheriffs as aforesaid, at the suit of the said *Timothy*, by virtue of the said writ, the said *William Picket* and *Thomas Skinner*, being *sheriffs* as aforesaid, afterwards, and before the return of the said writ, to wit, on the day and year last aforesaid, at *London* aforesaid, in, &c. and within their bailiwick, took bail for the appearance of the said *William* at the return of the said writ; and on that occasion, the said *William* then and there, to wit, on the 27th day of *April*, in the year aforesaid, at *London* aforesaid, in, &c. by his certain writing obligatory, commonly called a bail-bond, sealed with the seal of the said *William*, and now shewn to the court of our said lord the king, before the king himself, the date whereof is the day and year last aforesaid, acknowledged himself to be held and firmly bound to the said *William Picket*

and *Thomas Skinner*, then being sheriffs of the said city of *London*, as aforesaid, by the names and addition of *William Picket* and *Thomas Skinner, Esqrs.* sheriffs of the city of *London*, in the sum of 30*l.* of lawful money of *Great Britain*, to be paid to the said sheriffs, or their certain attorney, executors, administrators, or assigns, when he the said *William* should be thereto afterwards requested, with and under a certain condition subscribed to the said writing obligatory, that if the said *William* did appear before the lord the king, at *Westminster*, on *Wednesday* next after 15 days of *Easter*, to answer to the said *Timothy* in a plea of trespass, and also to a bill of the said *Timothy*, to be exhibited against the said *William*, for 30*l.* on promises, according to the custom of his majesty's court, before his majesty, then that obligation to be void, otherwise to be and remain in full force and virtue, as by the said writing obligatory, and the condition thereof (relation being thereto had), may more fully and at large appear; and the said *Timothy* in fact saith, that the said *William* did not appear before the lord the king, at *Westminster*, on *Wednesday* next after 15 days of *Easter*, in the condition of the said writing obligatory mentioned, according to the exigency of the said condition, but therein wholly failed and made default, whereby the said writing obligatory became forfeited; and the said *Timothy* further saith, that the said writing obligatory being so forfeited, and the money therein specified, or any part thereof, not being paid or satisfied to the said sheriffs, the said *William Picket* and *Thomas Skinner*, being then sheriffs of the city of *London* as aforesaid, afterwards, to wit, on the 3d day of *May*, in the year aforesaid, to wit, at *London* aforesaid, in, &c. at the request, costs, and charges of the said *Timothy*, the plaintiff in that suit, by an indorsement on the back of the said writing obligatory, then there made and attested in the presence of two credible witnesses, and sealed with their seal of office of sheriffs of the said city of *London*, assigned the said

County of Middlesex.

Sheriff of the county of Middlesex.

Set forth the condition.

Sheriff.

Sheriff of the county of Middlesex.

writing obligatory to the said *Timothy*, according to the form of the statute in that case made and provided, as by the assignment indorsed on the said writing obligatory as aforesaid, and duly stamped before the commencement of this suit, according to the form of the statute last aforesaid, and to the court of our said lord the king, before the king himself, now here shewn, the date whereof is the day and year last aforesaid, may more fully appear; by means whereof, and by force of the statute in such case made and provided, an action hath accrued to the said *Timothy*, as assignee of the said *Sheriffs*, to demand and have of and from the said *William* the said 30*l.* above demanded; yet the said *William* (although often requested, &c.) hath not as yet paid the said 30*l.* above demanded, or any part thereof, to the said *Timothy*, assignee as aforesaid, but he so to do hath hitherto wholly refused, and still refuses, to the said *Timothy*, assignee as aforesaid, his damage of 10*l.* and therefore he brings his suit, &c. Pledges, &c.

Sheriff of the
county of Mid-
dlesex.

Declaration upon
a bail-bond,
against one of
the bail, where
the bond was
taken on a spe-
cial *capias*; by
original.

London, (ss.) *Richard Fenn*, assignee of Sir *Robert Taylor*, Knight, and *Benjamin Cole*, Esquire, sheriffs of the city of *London*, according to the form of the statute in such case made and provided, complains of *William Doe*, being, &c. of a plea, that he render to the said *Richard*, assignee as aforesaid, 600*l.* of lawful money of *Great Britain*, which he owes to and unjustly detains from him; For that whereas the said *Richard* heretofore, to wit, on the 5th day of *June*, in the year of our Lord 1783, sued and prosecuted out of the court of our said lord the king, before the king himself (the said court being then and now at *Westminster*, in the said county of *Middlesex*), a certain writ of our lord the king, called a special *capias ad respondendum*, directed to the sheriffs of *London*, by which said writ, the said sheriffs were commanded to take one *John Denn*, if he should be found in their bailiwick, and him safely keep, so that they might have his body before his majesty on the morrow of the *Holy Trinity* wherefore

ever

ever his said majesty should then be in *England*, to answer the said *Richard* in a plea of trespass on the case upon promises, to the said *Richard* his damage of 600*l.* and that the said sheriffs should have there that writ; which said writ, afterwards and before the delivery thereof to the said sheriffs for execution, as hereafter is mentioned, was duly marked or indorsed for bail for 300*l.* by virtue of an affidavit before then made and duly assised of record, in the said court of our said lord the king, before the king himself, of the cause of action of the said *Richard* in that behalf, according to the form of the statute in that case made and provided; and which said writ so indorsed, afterwards, and before the return thereof, to wit, on the 14th day of *June*, in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was delivered to the said Sir *Robert Taylor* and *Benjamin Cole*, then being sheriffs of the said city of *London*, to be executed in due form of law; by virtue of which said writ, the said Sir *Robert Taylor* and *Benjamin Cole*, sheriffs as aforesaid, afterwards, and before the return of the said writ, to wit, on the day and year last aforesaid, at *London* aforesaid, in the parish and ward aforesaid, and within their bailiwick, took and arrested the said *John Denn*, by his body, and then and there had and detained him in their custody, at the suit of the said *Richard*, for the cause aforesaid; and the said *John Denn* being so arrested, and in custody of the said Sir *Robert Taylor* and *Benjamin Cole*, sheriffs as aforesaid, afterwards, and before the return of the said writ, to wit, on the same day and year last aforesaid, at *London* aforesaid, in the parish and ward aforesaid, and within their bailiwick, took bail for the appearance of the said *John Denn* at the return of the said writ, according to the form of the statute in such case made and provided, and on that occasion the said *William Doe*, as bail or surety of the said *John*, then and there, to wit, on the said 14th day of *June*, in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, by his certain writing obligatory,

tory, commonly called a bail-bond, sealed with his seal, and now shewn to the court here, the date whereof is the same day and year last aforesaid, acknowledged himself to be held and firmly bound to the said Sir Robert Taylor and Benjamin Cole, sheriffs of the said city of London, by the names and addition of Sir Robert Taylor, Knight, and Benjamin Cole, Esquire, sheriffs of the city of London, in the sum of 600*l.* of good and lawful money of Great Britain, to be paid to the said sheriffs, or their certain attorney, executors, administrators, or assigns, when he the said William should be thereunto required, with a condition to the said writing obligatory underwritten. that if the said John should appear before the lord the king on the morrow of the Holy Trinity, wheresoever, &c. to answer to the said Richard in a plea of trespass on the case upon promises to the said Richard his damage of 600*l.* then the said obligation should be void and of no force, otherwise should stand and remain in full force, vigour, and effect, as by the said writing obligatory, and the condition thereof, (relation being thereunto had), will more fully appear; and the said Richard in fact saith, that the said John did not appear before his majesty on the morrow of the Holy Trinity, wheresoever, &c. in the condition aforesaid mentioned, according to the exigency of the said condition, whereby the said writing obligatory became forfeited; and the said writing obligatory being so forfeited, and the said sum of money therein mentioned, or any part thereof, not being paid to the said sheriffs, the said Sir Robert Taylor and Benjamin Cole, then and now being sheriffs of the said city of London, afterwards, to wit, on the 25th day of June, in the year aforesaid, at London aforesaid, in the parish and ward aforesaid, at the request, costs, and charges of the said Richard, the plaintiff in the said suit, by an indorsement on the back of the said writing obligatory, then and there made and attested in the presence of two credible witnesses, sealed with their seal of office of sheriffs of the said city of London, assigned the said writing

writing obligatory to the said *Richard*, according to the form of the statute in such case made and provided, as by the said assignment indorsed on the said writing obligatory, and duly stamped before the commencement of this suit, according to the form of the statute in that case made and provided, and to the court of our said lord the king now here shewn, the date whereof is the day and year last aforesaid, may more fully appear; by reason of which said premises, and by force of the statute in that case made and provided, an action hath accrued to the said *Richard*, as assignee of the said *Sir Robert Taylor* and *Benjamin Cole*, sheriffs of the said city of *London* as aforesaid, to demand and have of the said *William* the said sum of 600*l.* above demanded: *Nevertheless*, the said *William* (although often required) hath not yet paid the 600*l.* above demanded, or any part thereof, to the said *Richard*, assignee as aforesaid; but he to pay the same, or any part thereof, to the said *Richard*, hath hitherto wholly refused, and still refuses, to the said *Richard* his damage of 20*l.* and therefore he brings his suit, &c. Pledges, &c.

If the bond be assigned by the late sheriffs (add If by the late those words), and that they assigned the same to the plaintiff; and instead of the words *now being sheriffs*, say (*then being sheriffs*); the venue may be laid in *London* or *Middlesex*, although the arrest and assignment were made in any other county. 2 *Lord Raym.* 1455. 2 *Str.* 727.

Oxfordshire, (ss.) *R. B.* complains of *J. B.* being in, &c. For that the said *J. B.* on the 5th day of August, in the year of our lord 1790, to wit, at *Burford*, in the said county, with force and arms, to wit, with swords, staves, sticks, and fists, made an assault on the said *R.* and then and there beat, bruised, wounded, and ill-treated the said *R.* inasmuch that his life was then and there thereby greatly despaired of, and other wrongs to him the said *R. B.* then and there did, against the peace of our lord the now king, and to the said *R.* his damage

Declaration for a common assault.

mage of 100*l.* and therefore he brings his suit, &c. Pledges, &c.

For an assault
and imprison-
ment.

*London, (js.) R. B. complains of J. B. being, &c. For that the said J. on the 1st day of November, in the year of our Lord 1790, with force and arms, to wit, with swords, staves, sticks, and fists, made an assault on the said R. to wit, at London aforesaid, in the parish of St. Mary-le-Bow, in the ward of Cheap, and then and there beat, bruised, wounded, and ill-treated her, and then and there imprisoned her, and kept and detained her in prison for a long time, to wit, for the space of ten days then next following, until she was forced and obliged to lay out and expend, and did lay out and expend, a large sum of money, to wit, the sum of 40*l.* in the obtaining of her discharge from such her imprisonment, without any reasonable or probable cause whatsoever, contrary to the laws and customs of this realm, and against the will of the said R. B. And also for that the said J. B. on, &c. (add another count for a common assault), and then and there did other wrongs to the said R. against the peace of our lord the now king, and to the said R. her damage of 100*l.* and therefore she brings her suit, &c. Add pledges, &c.*

For an assault,
and putting out
of plaintiff's eye
with a lighted
squib.

London, (js.) A. B. complains of C. D. being in the custody of the marshal of the Marshalsea, &c. For that the said C. on the — day of —, in the year of our Lord 1790, with force and arms, to wit, with sticks, staves, clubs, and fists, made an assault upon the said A. at London aforesaid, in the parish of St. Mary-le-Bow, in the ward of Cheap, and greatly bruised, wounded, and ill-treated him, so that his life was thereby then and there greatly despaired of, and then and there threw, cast, and tossed, a lighted squib, consisting of gunpowder and other combustible materials, at and against the said A. and struck the said A. on the face therewith, and so greatly burnt one of the eyes of the said A. that the said A. underwent and suffered great and

excruc

excruciating pain and torment for a long time, to wit, for the space of six months then next following, and afterwards wholly lost his said eye; and the said *A.* hath not only been forced to lay out and expend a large sum of money, to wit, the sum of 20*l.* in and about the said wound, but has also been prevented and hindered from following and transacting his lawful affairs and business, and is wholly deprived of the use and benefit of his said eye, and the sight thereof: And also for that the said *C.* on the day and year aforesaid, at *London* aforesaid, in, &c. made another assault on the said *A.* and threw, cast, and tossed a certain lighted fire-work, consisting of gunpowder, at and against the said *A.* and struck the said *A.* on the face therewith, and so greatly burnt one other eye of the said *A.* that the said *A.* for a long time, to wit, for the space of six months then next following, underwent and suffered great and excruciating pain and torture, and afterwards wholly lost his said eye; and the said *A.* hath not only been forced to lay out, &c. (*as in the first count*). Add a count for a common assault to the said *A.* his damage of 500*l.* and therefore he brings his suit, &c. Add pledges.

London, (js.) *J. R.* complains of *T. K.* being in the custody, &c. of a plea of trespass on the case, *Declaration in trover for plate.*
For that whereas the said *T. K.* on the 2d day of *November*, in the year of our Lord 1789, at *London* aforesaid, in, &c. was possessed of certain plate, *The day is not material.*
 to wit, one silver tankard, and one pint silver mug of the value of 10*l.* of lawful money of *Great Britain*, as of his own proper goods and chattels; and being so thereof possessed, he the said *T. K.* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. casually lost the said goods and chattels, out of his hands and possession, which said goods and chattels, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. came to the hands and possession of the said *T. K.* who found the same; yet the said *T. K.* knowing the goods
 and

and chattels to be the goods and chattels of the said *J. R.* and of right to belong and appertain to the said *J. R.* but contriving, and fraudulently intending, craftily and subtilly to deceive and defraud the said *J. R.* in this respect, hath not as yet delivered the said goods and chattels, or any part thereof, to the said *J. R.* (although often requested so to do), but he the said *T. K.* afterwards, to wit, on the 3d day of *November*, in the year aforesaid, at *London* aforesaid, in, &c. converted and disposed of the said goods and chattels to his own use; To the said *J. R.* his damage of 20*l.* and therefore he brings his suit, &c. Pledges, &c.

If the action is brought for money, add money, goods, and chattels.

Declaration in
trespass, break-
ing and entering
the close, eating
up, and treading
down corn with
cattle, &c.

Oxfordshire, (ss.) J. W. complains of *R. A.* being in the custody of the marshal of the *Marshallsea* of our lord the now king, before the king himself, for that the said *R.* on the 10th day of *October*, in the year of our Lord 1789, with force and arms, &c. broke and entered a certain close called *Rye Close*, of the said *J.* situate and being at *Witney*, in the said county, and there with his feet in walking, trod down, trampled upon, consumed, and spoiled the grass and corn, to wit, wheat, rye, barley, peas, beans, and oats of the said *J.* of the value of 10*l.* there then growing, and then and there with cattle, to wit, horses, mares, bulls, oxen, cows, and sheep, trampled upon, rooted up, consumed, and spoiled other the grass and corn, to wit, other wheat, rye, barley, peas, beans, and oats of the said *J.* of the value of other 10*l.* there then also growing, and other wrongs to the said *J.* then and there did, against the peace of our lord the now king, and to the said *J.* his damage of 20*l.* and therefore he brings his suit, &c. Add pledges.

Declaration in
trespass for
breaking and
entering his
house, &c.

London, (ss.) W. C. complains of *R. G.* being, &c. For that the said *R. G.* on the 20th day of *September*, in the year of our Lord 1790, with force and arms, broke and entered the dwelling house of the said *W.* situate, standing, and being at

at the parish of *St. Andrew, Holborn*, in *London* aforesaid, and stayed and continued therein for a long time, to wit, for the space of six hours, and during the whole time made a great noise, disturbance, and affray therein, and wrenched and forced open, or caused to be wrenched and forced open, the closet doors, drawers, chests, cupboards, and cabinets of the said *W.* and the goods, chattels, wares, and merchandizes of the said *W.* of the value of 500*l.* then and there found, tossed, tumbled, damaged, and spoiled, and then and there did other wrongs to the said *W.* against the peace of his present majesty, and to the damage of the said *W.* of 100*l.* and therefore he brings his suit, &c. Pledges, &c.

The breaking and entering the plaintiff's house is the principal ground of this declaration; and all the rest are not foundations of the action, but matters only thrown in, to aggravate the damages. 2 *Salk.* 642, 643.

Venue.

VENUE (*vicinetum* or *visnetum*) is the place **Venue**, from whence a jury are to come to the trial of causes, which is generally some neighbouring place, *Locus quem vicini habitant*, from whence it is called *vicinetum* or *venue*.

The general rule of law, as laid down by Lord *Coke*, is, *That every trial shall be out of that town, parish, or hamlet, or place known, out of the town, &c. within which the matter of fact issuable is alledged, that is most certain and nearest thereunto, the inhabitants whereof may have the better and more certain knowledge of the fact.* *Co. Litt.* 125. a. General rule of law respecting the venue.

Many niceties which were formerly to be observed with respect to laying the *venue*, are now removed by the 4 & 5 *Ann. c.* 16. which enacts, "*That every venire facias, for the trial of any issue, shall be awarded of the body of the proper county where such issue is triable.*" Many niceties got over.

By

By *stat. 24 Geo. 2. c. 18.* Every *ven. fac.* for the trial of any issue in any action or information upon any *penal* statute in any of his majesty's courts of record at *Westminster*, in the counties palatine of *Lancaster, Chester, and Durham*, and the principality of *Wales*, shall be awarded of the body of the proper county where such issue is triable. *f. 2.*

Real actions to be laid in the proper county.

All actions, real or mixed, as *trespass, quare clausum fregit, ejectment, waste, &c.* must be laid in the county where the lands lie. *Bract. 189. 414.* So debt for rent, against an assignee of a term, on the privity of estate, is local, and will lie no where but in that county where the lands are. *Cro. Car. 183. 1 Wils. 165. Latch. 187. W. Jon. 43.* Debt upon estate is also local. *2 Lill. Ab. 782.*

Venue by bill is local or transitory.

The venue by *bill* is *local* or *transitory*; *local* when the action could only have arisen in a *particular* county, and *there* the venue must be laid, or the defendant may demur to the declaration, *1 Wils. 165. Thrale v. Cornwall*; or the plaintiff on the general issue will be nonsuited at the trial. *Cotw. Rep. 410.*

If action arises in any county.

But where the action might have arisen in *any* county, it is *transitory*, and the plaintiff may in *general* lay the venue wherever he pleases; subject to its being changed by the court, if not laid in the very county where the action arose.

The loss of bail.

The venue by *original* must be laid in the county where the *original* is issued, and where the action is intended to be tried, otherwise the plaintiff will lose his bail.

Personal actions not,

On all personal actions, as debt, detinue, assault, deceit, trover, and conversion, account, slander, and the like, the plaintiff may declare in what county he pleases. *Co. Litt. 282.* So against a sheriff for a false return. *1 Wils. 136.* If a personal action be founded upon a thing done out of the realm, it may be brought in any county, and shall be alledged at such a place, in such a county: as if debt be upon a bond or bill made at *Hamburgh*,
it

it may be alledged at *H. viz. at Islington, in the county of Middlesex. Latch. 5. Salk. 660. 659. Lutw. 950. 2 Cro. 76.*

When an action is for a *transitory thing*, it may be brought in any county, as if it be upon a *covenant or contract*, or *debt at large*; for *debitum ex contractus sunt nullius loci. 7 Co. 3. a. 2 Inst. 229. 231.*

When an action is founded upon two things in different counties, both material to the maintenance of the action, it may be brought in the one county or the other. *7 Co. 2. a. Dy. 38. b. 40. a. Salk. 669.* As if an arrest be in one county, and an escape in another. *1 Lev. 114.* So in an action for a false return of *non est inventus*, where the sheriff was in company of the party. *2 Mod. 23.* So if the matter in one county is dependant upon matter in another, the plaintiff may have the action in the one county or the other. *7 Co. 1. b.* As if two conspire to indict another, and make the execution of the conspiracy in another county, conspiracy lies in the one county or the other. *7 Co. 1. b.* So for maliciously suing an execution in *Middlesex*, whereby he was arrested in *Dorsetshire. Cro. Eliz. 574.* So if an action on the case be against the sheriff of *Denbighshire*, for not arresting a man upon a *capias utlagatum* to him directed in *Denbighshire*, upon which he returned *non est inventus*, it may be in *Denbighshire*, or in *Middlesex*, where the return was made. *Hob. 209.*

When the action is founded on two things, in different counties, how to be brought.

In an action upon a lease for rent, &c. founded on the privity of *contract*, as in *debt* by the lessor against the lessee, *6 Mod. 194. 2 Str. 776*, or his executor in the *deinet* only, *Gillb. 403*, or in covenant by the lessor, *3 Lev. 154*, or grantee of the reversion, *1 Sound. 238, 1 Wils. 165, Carth. 183*, against the lessee the action is *transitory*; and the venue may be laid in any county, at the option of the plaintiff.

Action on lease for rent.

Holt C. J. said, if a cause of action arises partly in one county, and partly in another, it is in the election of the plaintiff to lay it in which county he pleases.

If it arises partly in one county and partly in another.

pleases. As if a country chapman sends a letter to a tradesman in *London*, to send him goods into the country, he delivers them accordingly, and they come to the chapman's hands, there the cause of action arising in both counties, he may lay them in either. 12 *Mod.* 76.

If assault happen abroad, may lay venue in *London*.

If an assault and imprisonment happens at *Minorca*, it may be laid at *London*, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*; *Fabricas v. Mostyn*, *Hill. T.* 1775; and if the plaintiff is banished from *Minorca* or *Carthagera*, it may be laid in *Minorca*, to wit, at *London*, &c. *Cowp. Rep.* 178.

Every transitory action may be laid in any county in *England*, though the matter arise beyond the seas. *Ibid.* 181.

Actions on penal statutes to be laid in their proper county.

By *stat. 21 Jac. I. c. 4.* All suits on penal statutes shall be laid in their proper county, and if on the general issue pleaded, the offence be not proved in the same county in which it is laid, the defendant shall not be found guilty.

If rent be received in *Middlesex*, and account settled in *London*.

A. by deed executed in *London*, for the securing the repayment of money lent to *B.* was appointed receiver of *B.*'s rent in *Middlesex*, with a pretended salary, which enabled him to retain usurious interest. He received the rent in *Middlesex*, but settled the account in *London*, and there paid the balance on which the usurious interest is allowed. The offence is completed in *London*, and the venue in a *qui tam* action for the penalty is properly laid there. *Scott qui tam v. Bress*, *Term Rep.* 2 *V.* 238. *Vide Douglas* 223.

Construction of the act 21 *Jac.*

This act does not extend to any offence created since the statute; so that prosecutions on subsequent penal statutes are not restrained thereby, but that statute is as to them, as it were, repealed *pro tanto*. 1 *Salk.* 372. by ten judges. Secondly, That all informations and popular actions on penal statutes made, before that act, must by force of 21 *Jac. I. c. 4.* be laid, brought, and prosecuted, in the proper county where the fact was done. *Ibid.* *Bunbury* 236.

" So if actions are brought against any justice, So against officers, &c.
 " mayor, or bailiff of any city, town corporate,
 " head borough, portreeve, constable, tithing man,
 " collector of subsidy, fifteenths, church-wardens,
 " and other persons called sworn men, executing
 " the office of churchwarden or overseer of the
 " poor, and their deputies, or any of them, or any
 " other which in their aid and assistance, or by their
 " commandment, &c. the *venue* must be laid where
 " the fact was committed, or the defendant must
 " be found not guilty." *Stat. 21 Jac. 1. c. 12.*
stat. 5. Vide Str. 446. Vaughan 113.

A nuisance must be laid in the proper county. Nuisance, debt for rent, &c.
Cro. Car. 133. Jones 43.

The county in the margin of the declaration will help, but not hurt. Hence if there be no *venue* laid in the body of the declaration, reference must be had to the margin; but where a proper *venue* is laid in the body, the word in the margin will not vitiate it. *Cas. Temp. Hard. 343, 344. 3 Term Rep. 387. Mellor v. Barber.* If no venue be laid in the body of the declaration.

Where an attorney is plaintiff, and sues in his own court by *attachment of privilege*, he may lay the *venue* in *Middlesex*, and it cannot be changed. *Pope v. Redfearne, one, &c. 4 Burr. 2027. 3 T. Rep. 573.* But an attorney defendant has not the privilege of changing the *venue* into *Middlesex*, where it is laid in another county. *Ibid. 2 Str. 1049. contra.* Attornies.

Debt for rent or indenture laid to be made at *London*, for the demise of lands in *Surrey*. The action was laid in *London*. On demurrer it was held, that the plaintiff had his election to bring it in either against the lessee; otherwise had it been against an assignee who is chargeable only on the privity of estate. *Paterfson v. Scott, 2 Str. 776.* Debt for or against lessee, or assignee.

Of

Of changing the Venue in transitory Actions.

Court will not change the venue to any of the four northern counties previous to spring circuit.

THE *stat.* of 6 R. 2. c. 2. having ordered all writs to be laid in their proper counties, this, as the judges conceived, impowered them to change the venue, if required, and not to insist rigidly on abating the writ, which practice began in the reign of James the First, 2 *Salk.* 670. and this power is discretionally exercised, so as *not to cause* but *prevent a defect of justice*; therefore the court will not change the venue if moved in Michaelmas or Hilary term to any of the four northern counties, previous to the spring circuit; because there the assizes are holden only once a year, at the time of the summer circuit, 1 *Wils.* 138. *Str.* 480. nor can it be changed, but to a county where the whole cause of action arose. 1 *Wils.* 178. *Herring v. Durant.*

In what cases venue cannot be changed.

The venue is not changeable in an action for *scand. magnatum*, promissory note, or bill of exchange. *Lev.* 56. *Carth.* 400. *Vent.* 363. *Barnes* 482. 492. So in covenant, for the venue cannot be changed if on a specialty. *Leo.* 307. *Barnes* 491. 2 *Str.* 878. So in an action for a false return. *Salk.* 669. But it is laid down in *Burr.* 1564. with good reason, *That in transitory actions the court ought to change the venue, when it appears upon the circumstances laid before them, that there is a probable ground to apprehend that a fair, impartial, or at least a satisfactory trial cannot be had.* *Mylock v. Saladin.* *Cowp. Rep.* 510. *Petyt v. — Berkeley, Esq.*

Refused in an action for a libel.

Motion to change the venue from London to Wiltshire, in an action for a libel in a paper, refused. *Pinkney v. Collins, Term Rep.* 1 V. 571. In *Hofkins v. Ridgway* same application, and refused, because the paper, though printed in Lancashire, was circulated and sold in other counties.

So in a letter written.

So in an action for a libel in a letter written in one county and sent into another, it cannot be changed into

into the county in which it was written, because the defendant cannot swear that the cause of action arose wholly in that county. *Cliffold v. Cliffold*, *ibid.* 647.

In an action for a libel written in one place and Libel written, sent to another, both in the same county, rule absolute to change the *venue* into the county in which it was both written and published. *Freeman v. Norris*, 3 *Term Rep.* 306.

The *venue* in an action for a libel in a letter In a letter, written in *Yorkshire* and sent by the post into *Germany*, may be changed from *London* to *Yorkshire* on the usual affidavit. *Metcalf v. Markham*, 3 *Term Rep.* 652.

Debt on bond made at *Derby* to the intestate, the Debt on bond, declaration alledged administration was granted to the defendant by the bishop of *Litchfield* and *Coventry*; and the *venue* in the margin in *London*. The defendant demurred generally. *Buller J.* On a special demurrer, there might have been some doubt. But a *bad venue*, or the want of *Bad venue, of one*, is cured by the statute of jeofails. *Grose J.* want of one. Here the *venue* is laid in the body of the declaration at *Derby*; the addition of *London* in the margin will not vitiate it. *Mellor adm. v. Barber*, 3 *Term Rep.* 387.

When a fair trial cannot be had in the county Venue changed where the matter arises, the trial will be awarded in from *Chester* to *Salop*. the next *English* county, where the king's writ of *venire* runs. Therefore where the action arose in the city of *Chester*, and a fair trial could not be had there, the *venue* was awarded into the county of *Salop*. *The King v. Amery*, *Term Rep.* 1 *V.* 363.

It is not settled whether the court can change the *Wales*; *venue* from an *English* to a *Welsh* county. *Dougl. Rep.* 262. *Pritchard v. Pugh*.

Mr. J. Buller said, the doubt was to whom the writ of inquiry must be directed in case of judgment by default.

Lord Mansfield, on a motion to change the *venue* There is good reason to refuse the *venue* being first changed from an

English county to the next English county, because the affidavit cannot be departed from.

first see why the court should refuse to change it into the next *English* county; as the *same reasons* seemed to hold for doing that, as for changing it from one *English* county into another *English* county. But Mr. J. *Denison* had satisfied him that there was a good reason for refusing it: which is, that the *form of the affidavit* is so religiously settled, that it cannot be departed from; and in the case of changing it into the next English county, they cannot swear in that form which is essentially requisite on such motions; namely, That the cause of action arose in the county which is prayed to change the venue, and not elsewhere out of the said county, where it was originally laid. *Waddington v. Thelwell*, *Esq.* 4 Burr. 2450.

But the court changed the venue from *Middlesex* into *Wales*, no cause being shewn. *Ibid.*

Cannot be changed into a county palatine.

The venue cannot be changed into a county palatine, but it was changed into *Chester*, because the court can send down the record by mittimus. *Lord Ray*, 1418. 1 *Wils.* 222.

It cannot be changed if it will delay trial, as to *Bristol*. *Str.* 1180. Nor changed to a third county without consent. *Ibid.* 1216. *Southhouse v. Boak*.

Attornies, &c.

Nor where the plaintiff is an attorney, and lays his action in *Middlesex* (except for special cause). 2 *Vent.* 47. *Sho.* 148. *Carth.* 126. Otherwise if he lays it in *London*, or elsewhere, for then he waives his privilege. *Ibid.* 2 *Vent.* 47. Nor because some of the defendants are barristers or attornies. *Str.* 610. *Townsend v. Duppa et al.*

In what cases it may be changed from a county at large into a city and county.

The venue may not be changed from a county at large into a city and county, *Barnes* 388.; but it has been changed from a county at large into *London*, *ibid.*; and it may be changed from one county and city into another county and city, *Prac. Reg. C. P.* 429.; but it cannot be changed into *Hull*, *Canterbury*, &c. because it is not known when an assize will be held there; nor into the city of *Worcester* or *Gloucester*, out of the county at large,

large, because the assizes for the city and county at large are held at the same place: but the reporter says, all this is in the discretion of the court. *Barnes* 490.

An attorney has no privilege to have the venue changed into *Middlesex*, where he is defendant, though he has a privilege, when plaintiff, to lay it and keep it there; but if he sues in *auter droit* as executor, &c. or jointly with another person, his privilege is lost. 4 *Burr.* 2027. *Pope v. Redfearne*, one, &c. Attorney has no privilege to change the venue if in *Middlesex*, though he may keep it there, if plaintiff.

The same respecting officers of the court, refused to be changed from *Middlesex* into a *Welsh* county. *Ibid.*

Within what Time the Venue may be changed.

THE defendant cannot move to change the venue in any action until his appearance be entered; nor after plea pleaded. *Loft. Rep.* 321. When the venue may be changed.

But after issue joined in debt on bond, and the cause in the paper for the sittings after *Easter term*, on motion in that term, it was changed from London to *Lincoln*, on the ground that the witnesses for both parties lived in *Lincolnshire*, and that there was a serious defence intended to be made; the defendant undertaking to give judgment of *Trinity term*, and not to bring a writ of error. The pleas were, *non est factum*, *solvit post diem*, and *usury*. *Foster v. Taylor*, 1 *Term Rep.* 781. But the court will not change the venue "because the witnesses live in that county." *Ibid.* After issue it was changed.

That although the declaration be delivered seven days before the last day of the next preceding term, or after, yet before plea, upon oath made, the venue may be changed upon motion in the said transitory actions the next term after; and the defendant to plead to the new action as he should have done, without delay. *R. Mich.* 1654. *sect.* 5. "That the venue may be changed, if defendant

comes in by
exigent.

"may be changed (upon oath), though the defendant come in by exigent." *Ibid.*

Per Cur. If the declaration be delivered so early in term, that the defendant has *eight days* in that term, he cannot move to change the *venue* the next term. *Str.* 211. *Asplin v. Gray.*

May be changed,
after order for
time, but not
when upon
terms.

The *venue* may be changed after an order for time to plead, though upon the terms of pleading *issuably*; but not after such an order when the terms are, *to plead issuably, and take short notice of trial at the first sittings* in London or *Middlesex*, because there a trial would be lost. *Cowp. Rep.* 51. *Petyt v. Berkely, Esq. contra 1 Wils.* 245. *Wightman v. Thompson.*

Nor when on
terms to try the
first sitting in
Middlesex.

The defendant obtained a rule to change the *venue* from *Middlesex* to *Gloucester*, where cause of action arose; motion to set it aside. It was objected to, because the defendant was too late, inasmuch as he had previously applied for and obtained an order to try the first sitting in *Middlesex*. The action was for words spoke at the time of an election for *Gloucester*, and it was said there could not be a fair and impartial trial. Lord *Mansfield* said, upon either ground, the rule for discharging the rule obtained, should be made absolute. *Ibid.*

Shall not after
effoign of subse-
quent term,
change.

After the effoign day of the subsequent term after appearance, the plaintiff shall not alter his *venue*, though he would pay costs, or give an imparlance. *N. on R. M.* 10 *Geo.* 2.

Plaintiff must
move to dis-
charge before
replication.

It was held that as the defendant must move to change the *venue* *before plea pleaded*; so the plaintiff must in like manner move to discharge the rule, on undertaking to give material evidence *before replication*. *Dickenson v. Fisher.* *Str.* 858.

Plaintiff cannot
change the
venue, but he
may do it by
amending.

Though the plaintiff cannot regularly move to change the *venue*, yet he may in effect do it by moving to amend; and it was done so by striking out *Dorsetshire*, and inserting *Middlesex*. *Stroud v. Tilly.* *Str.* 1162. The court suffered the plaintiff to amend the *venue*, after defendant had changed it upon the common affidavit, *ib.* 1202. but never suffer it to be changed in debt, *ib.* 878. *Dupleffus v. Chalk.* *Str.* 878. *Fitzgib.* 166. *Barn.* 379.

The Method of moving to change the Venue.

NO notice is necessary to be given to the plaintiff's attorney, previous to the motion to change the venue, but the client makes the following affidavit; which give to counsel, with 10s. 6d. for him to move; the rule is absolute in the first instance; in the evening draw up rule, pay for the same 5s. filing affidavit, if sworn in the country, 2s. serve copy on plaintiff's attorney; the plaintiff's attorney will alter the declaration; if he does not, it will be considered as altered by the rule.

How to move to change the venue.

After changing the venue, the defendant must plead, as he should have done before without delay. *R. M. 1654. f. 5.*

After venue changed, when to plead.

John Denn, plaintiff,
and
Richard Fenn, defendant.

Richard Fenn, of *Bread-street*, *London*, factor. Affidavit.
The above defendant, maketh oath and faith, That the plaintiff's cause of action, mentioned in the declaration in this cause (if any such there be), arose in the county of *A.* and not in the county of *B.* or elsewhere out of the county of *A.*

Of bringing back the Venue by the Plaintiff.

Notwithstanding the defendant has it in his power to remove the venue from the place laid, to the place where the cause of action arose, the plaintiff may, on shewing cause, "undertake to give material evidence of some matter in issue, arising in the county wherein the action is laid; in that case, the rule will be discharged; but if at the trial he fails therein, he must be nonsuited. 2 *Black. Rep.* 1031. For it is not enough to say, that the witnesses to prove the contract resided there. *Ibid.*

Upon plaintiff's undertaking to give evidence of some matter in issue arising in the county, the rule to change the venue will be discharged.

After the venue had been changed from *London* to *Lincolnshire* by defendant, the cause had gone down to

The venue was brought back after two trials, to

on plaintiff's
undertaking to
give material
evidence in
London.

to trial at *Lincoln* assizes, where the plaintiff was nonsuited. New trial directed. The cause went down a second time to the assizes at *Lincoln*, and made a remanet for defect of jurors. There was a rule obtained for bringing back the *venue* to *London*, upon undertaking to give material evidence *there*. The objection made was, that it was too late after all these proceedings, and therefore the defendant moved to discharge that rule. Lord *Mansfield* said, we desired the master to enquire into the practice, whether the plaintiff could bring back the *venue* after plea pleaded. He has met with two cases in *Str.* 858. *Dickenson v. Fisher*, & 162. *Stroud v. Filly*. We think it an idle circuitry to put the plaintiff to move to amend his declaration in order to come at an alteration in the *venue*, and if we permit him now to bring it back, he does it at his peril, because if he does not give material evidence in *London*, he must be nonsuited; and if it should appear to be a local action by statute, he will be nonsuited upon the opening. The former rule must stand, and take nothing by the latter. *Bruckshaw v. Hopkins*. *Cowp. Rep.* 409.

Rule for pay-
ment of money
into court held
sufficient.

Action of assumpsit, the *venue* was changed by a rule of court from *Middlesex* to *London*, and the rule was afterwards discharged, on the plaintiff's undertaking to give in evidence some matter in issue, arising in the county of *Middlesex*, where the action was first laid; after which the defendant paid 7*l.* into court. The plaintiff produced an office copy of the rule, and the judge was of opinion that it was sufficient. *Watkins v. Towers & others*, 2 *Term Rep.* 276.

How to change
the venue in
vacation.

If the defendant wants to change the *venue* in vacation, he may obtain a judge's order for that purpose, and such order will be made upon producing the usual affidavit and a counsel's hand, "the plaintiff being at liberty to change the same back again, on undertaking to give evidence in the former county;" pay order 2*s.* rule 6*s.* serve it on plaintiff's attorney.

Originally

Originally it was required, that the plaintiff should give no evidence at the trial, but what arose in the county wherein the *venue* was retained. 1 *Keb.* 189. 1 *Sid.* 442. If he gave none such, he must have been nonsuited of course. But when it was laid down in *Swain's* case, 1 *Sid.* 405. that the plaintiff might lay his *venue* in any county wherein part of the cause of action arose, he was then bound only to give some evidence, and not the whole, in the county where the *venue* was laid, *Salk.* 669. 12 *Mod.* 515. which continues to be the rule at this day. And if the plaintiff fails to make good his undertaking, he is nonsuited now, which has the same effect as judgment for the defendant in a plea in abatement, viz. *quod eat sine die*, and the plaintiff must begin again. 2 *Black. Rep.* 1034.

Formerly it was required to give evidence in the county wherein the *venue* was retained, or be nonsuited.

But since bound only to give some evidence,

or be nonsuited.

Where a rule is made to change the *venue*, and afterwards the plaintiff would bring it back again, the rule must be, *dare aliquam evidentiam de materia in exitu*, in the county where the action was brought. *Salk.* 669.

If after rule to change, the plaintiff undertakes to bring *venue* back, must give evidence of some matter in that county.

Rule to Plead.

ANCIENTLY there were two rules to plead given, of four days each; the first, *ad respondendum*; the second, *ad respondendum peremptoriè*. 2 *Salk.* 517. These were afterwards converted into one eight-day rule, *Ibid.* In *Trin.* 1 *Geo.* 2. the time for pleading was shortened to four days: And when the rules to plead ran for eight days, the course of the court was to allow the four first only for pleas in abatement; but as to pleas in chief, it was sufficient if they came in any time before judgment signed. *Long v. Miller.* 2 *Str.* 1192.

The rule to plead is an order of the court; but cannot be given on a Sunday, or on the purification. 1 *Str.* 86. *Anon.* If the rule expires on a Sunday, the defendant has all the next day to plead in.

Cannot be given on a Sunday.

Before a plea can be compelled, or a plaintiff become intitled to judgment for want of it, a rule to plead must be entered with the clerk of the rules.

Rule must be given.

If bound by an order.

But if a defendant is bound by rule or order of court, to plead by a time therein limited, it is incumbent on him to plead by such time, although the plaintiff does not enter any rule to plead, or call for a plea. *N. on R. T. 5 & 6 Geo. 2.*

If a rule be given and an amendment made, no new rule.

If a rule to plead be entered the same term an amendment is made, though before such amendment, it is sufficient; otherwise a new rule to plead must be entered. *N. on Rule M. 10 Geo. 2.*

The rule is given by delivering a slip of paper to the clerk of the rules with the title of the cause in this form,

Form of the rule.

Johnson v. Sprat.
Den v. Ray.

} Rules to plead.

} A. K. attorney.

7th November 1791.

Take it to the clerk of the rules in *Portugal-street*; pay him for each rule 1s. 10d. which he enters in a book kept for that purpose. The rule expires in *four days inclusive*, but no judgment can be signed until *four days exclusive* of the day it is given; and *Sunday*, or an *holiday* on which the court does not sit, is to be accounted a day within the said rule (except it happen on the last day); if it is given on the "*purification*," that is no day. It may be given any time in term, or within four days after.

When not necessary.

No need of a new rule to plead, if there be a judge's order, which does not expire till the first or second day of the next term: But in all other cases, there should be a new rule to plead, to warrant the judgment signed, as of that term in which it is so signed. *Gilb. Rep. 318.*

The clerk of the rules will accept a rule to plead on the *essoign day*, but such rule cannot be entered until the *first day of term*.

Of obtaining Time to plead.

If the defendant be not ready to plead by the expiration of the time allowed him for that purpose, his attorney or agent may obtain a summons from a judge (but it must be a day previous to the expiration of his time) to shew cause why the defendant should not

not have a week's time. If such summons be returnable *before the plaintiff can sign judgment*, it is a stay of proceedings, *Say. Rep.* 165; but it is otherwise when taken out or returnable, *after the expiration of the time for pleading*, provided the plaintiff proceeds.

A copy of the summons is to be served on the plaintiff's attorney, who will either indorse his consent thereto, or attend the judge; but defendant, in town causes, will be bound down to terms of *taking short notice of trial, pleading issuably and rejoining gratis*, if plaintiff was in time to proceed to the trial, if not, only pleading issuably.

N. B. The plaintiff's attorney may (though it is very unusual) stay till the *third* summons before an order can be made. And if default is made on the third summons, the judge will, on affidavit of the service and attendances, make an order *ex parte*.

N. B. A month's time to plead is a *lunar month*, or 4 weeks, and not a *calendar month*. *3 Burr.* 1455.

The order must be served in like manner as the summons.

Where the defendant is an *executor or administrator*, the order will be for him not to plead any judgments, since the time for pleading was out, *8 Mod.* 308. for otherwise he might confess judgment in the mean time, and plead them in bar to the plaintiff's demand.

What is a Plea within the Meaning of an Order.

When the defendant is under a judge's order to plead issuably, and pleads a plea which is *not issuable*, the plaintiff may consider it as a *mere nullity*, and sign judgment.

But a plea of the stat. 23 *H. 6. c. 10.* against sheriffs taking bonds *ex colore officii* was held to be a plea within the order. *Dearden v. Holden*, *1 Burr.* 605. The judge's order does not confine the defendant to plead the general issue. *Ibid.*

A plea of a judgment recovered, or in abatement, is not within the order, *1 Black. Rep.* 376. *1 Burr.* 59.

A plea

A plea of tender has been deemed an issuable plea, 1 Burr. 59, *Kilwick v. Maidman*. And now the statute of limitations is held an issuable plea within the order. *Rucker v. Hannay*, 3 Term Rep. 124. *contra* 2 Vol. 390. But where the defendant being under an order to plead issuably, and he pleaded several pleas, all of which were issuable except one, plaintiff signed judgment, as for want of a plea the judgment was held regular, because one plea was pleaded in disobedience of the order. *Waterfall v. Glode*. 3 Term Rep. 305.

A real and fair demurrer is an issuable plea within the meaning of a judge's order, but a sham demurrer is not. *Gray v. Ashton*. 3 Burr. 1788.

Pleading issuably means, pleading such an issue as the plaintiff may go to trial upon. 2 Burr. 782. *Foster v. Snow*.

When Defendant ought to plead.

IF a declaration be delivered *de bene esse*, on common process, he is to plead in eight days after filing or delivery. R. Trin. 22 Geo. 3.

If *de bene esse* on special bail, if the action be laid in London or Middlesex, and the defendant lives within twenty miles of London, then to plead in four days (provided a plea is demanded). *Ibid*.

If the venue is laid in any other county, or the defendant lives above 20 miles, eight days. *Ibid*.

If intitled to an imparlance, to plead within the first four days of the next term, in all cases.

If plaintiff files common bail according to the statute and then declares, defendant has four days to plead (if declaration be delivered 4 days before the end of the term in which the writ was returnable), and the venue is laid in London or Middlesex, and the defendant lives within 20 miles of London. But if the venue be laid in the country, or the defendant lives above 20 miles from London, then eight days. Vide Rule, Trin. 22 Geo. 3.

Sunday

Sunday is accounted a day unless it be the *first* or *last* day. If rule expires on Sunday, defendant has all the *next* day to plead. *Str.* 86. *Anon.*

If he pleads in abatement, to plead in *four* days *inclusive* of both days, whether rule to plead be given or not. *Jennings v. Webb*, *Term Rep.* 1 *V.* 277. 690. *Brandon v. Payne.*

If the last of the *four* days happen on a Sunday, the defendant may plead in abatement the next day. *Lee v. Carlton*, 3 *Term Rep.* 642.

Demand of Plea.

WHEN special or common bail is filed by the defendant, there must be a plea demanded When plea must be demanded.

in writing of defendant's attorney, before the plaintiff can sign judgment; although notice to plead be indorsed on the declaration, 1 *Wils.* 134. *Holt v. Oldfield*, and such demand must be delivered *twenty-four hours before judgment can be signed* by default. 1 *Black. Rep.* 50. *Term Rep.* 1 *V.* 454. And if judgment signed before such demand made, it will be set aside with costs; so ruled in *E. T.* 1783.

The demand of a plea must be in writing, and is Demand of plea. in this form: "*Doe v. Roe. The plaintiff demands a plea in this cause, by your's, &c. A. K. plaintiff's attorney.*" and to be delivered to, or left with, the defendant's attorney.

If a declaration be filed *de bene esse*, and notice When not necessary. given to the defendant thereof, in that case, if the defendant does not file common bail within *eight* days, and plaintiff files it for him, there is no necessity to demand a plea before signing judgment.

The demand of plea is a waiver of bail; there- Demand of plea, waiver of bail. fore before demand is made, take care that bail is justified.

A demand of a plea before the defendant has Demand before appearance. appeared, or the plaintiff filed common bail for him, is a nullity. *Cook v. Raven*, 1 *Term Rep.* 635.

In

Prisoners.

In the case of a prisoner *in this court*, there must be a demand of plea; if he is in custody of the sheriff, no demand is necessary. *Rose v. Christfield*, 1 Term Rep. 591. Mr. J. Buller.

Per Cur. The rule is, that judgment may be signed for want of a plea at any time after twenty-four hours from the time of the plea demanded. *Dyche v. Burgoyne*. 1 Term Rep. 454.

Court held, that at all events the plaintiff cannot sign judgment till the expiration of twenty-four hours after the demand of a plea. *Bowles v. Edwards*, 4 Term Rep. 118.

The demand of a plea on the back of a declaration is bad, it must be after declaration delivered,

Imparlance.

Definition.

EMPARLANCE or *imparlance*, is a desire or petition in court of a day to consider, or advise, what answer the defendant shall make to the action of the plaintiff; and it seems to have arisen from a notion of religion mentioned in *St. Matthew*, c. v. ver. 25. in obedience to that precept in the Gospel, “agree with thine adversary quickly, whilst thou art in the way with him.” They looked upon the plaintiff at the time of declaring, to be in his way towards judgment; and therefore, since the defendant was ordered by the precepts of religion to agree with him, that there was a necessity to give him time for that purpose; this imparlance was entered when the writ was general, because the defendant did not know how to agree with the plaintiff till he had heard his full demand; and therefore then the defendant might have agreed with him in the country, whilst he was in the way, according to the letter in the text, in which case there was no need of a *libertas loquendi* to be entered upon the roll. And it may be observed that this Gospel precept has a plain reference to the Roman law of the

Twelve Tables, which expressly directed the plaintiff and defendant to make up the matter whilst they were in the way, or going to the prætor; *in via rem uti pacunt orato.*

Impar lance is said to be when the court gives the party leave to answer at another time, without the assent of the other party. *Com. Dig. title Pleader, D. 1.* But the more common signification of impar lance, is time to plead; *2 Show 310. 2 Mod. 62.* and it is either *general* without saving to the defendant any exception, which is always to another term, *Mod. 28*; or *special*, which is sometimes to another day in the same term, *6 Mod. 8.* with a saving of all exceptions to the writ, bill, or count; or of all exceptions whatsoever: which latter is called a general impar lance. The *general impar lance* is of course where the defendant is not bound to plead the same term; but a *special impar lance* is not allowed, without leave of the court. *R. E. 5 Ann.* After a general special impar lance, the defendant may not only plead in abatement of the writ, bill, or count, but also privilege. *1 Lev. 54. 12 Mod. 529. 5 Mod. 335.* But I take it that such plea must be intitled of the term the declaration is filed.

It is ordered that a special impar lance shall not be allowed the defendant, without the leave of this court first obtained. *R. E. 5 Ann.* No special impar lance without leave.

If the writ be returnable *before the last return of any term*, and the declaration *not filed and notice given four days exclusive before the end of such term*, the defendant is intitled to an impar lance. *R. Trin. 22 Geo. 3.* When intitled to an impar lance.

If the writ be returnable on the last day of term, the defendant is of course intitled to an impar lance; but must plead in four days of the next term, provided a rule be given either in a town or country cause. When of course;

On a declaration delivered of *Hilary*, there may be an impar lance to *Trinity* term, if defendant has not pleaded before; for it is the course of the court to give impar lance or declaration till the day of pleading. Declaration of Hilary, impar lance to Trinity.

Writ returnable one term, declaration not delivered before es- soign of the next impar lance.

pleading. If a writ be returnable in one term, and the declaration is not delivered *before* the essoign day of the *second* term, the defendant is not obliged to plead in the *same* term, but is intituled to an impar lance.

Refused.

Court refused to grant an impar lance, where the cause was removed by *habeas corpus*. It was removed the 6th of *November*, and declaration delivered the 12th. *Wood v. Wenman*, 1 *Wils.* 154. *Salk.* 515.

Within what Time Defendant is to plead where there have been no Proceedings for four Terms, in Law or Equity.

How to proceed if four terms are elapsed.

IF four terms are elapsed, after the declaration is delivered, the defendant shall have a whole term's notice to plead, before judgment can be entered against him, unless the cause has been stayed by injunction or privilege. *N. on R. Tr.* 5 & 6 *Geo.* 2. In this case you give notice to defendant, or his attorney, *before the essoign of the term*, that you intend to proceed the next term, "*by giving a rule to plead.*" The like rule to reply, rejoin, &c.

Notice of intention to proceed delivered two days before Hilary term, Rule to plead 14th Feb, and judgment signed for want thereof 18th April, held regular.

Two days before *Hilary term*, plaintiff gave notice of his intentions to proceed; on the 14th of *February*, two days after *Hilary term*, the rule to plead was given, and on the 18th of *April*, in the course of the same vacation, the plaintiff signed judgment for want of a plea, which was moved to be set aside for irregularity; and it was contended, that defendant ought to have had the term and vacation, as also until the four first days in *Easter term*, to have pleaded, for that no rule to plead could be given in the vacation; and if the vacation as well as the term were not meant to be included by the rule, the judgment had been signed too soon, for it appears to be signed of *Hilary term*, so that there was not even a term's notice: On the contrary, it was insisted,

sisted, that according to the practice of the court, the judgment was regular, for that the rule did not extend beyond the term ; and though the judgment appeared to be signed of *Hilary term*, the defendant had in fact the benefit of the rule for a whole term. The court were of that opinion, adding, that the judgment would appear to be regular on the record, though signed as of *Hilary Term* ; for the rule requiring a term's notice, where no proceedings have been had in the cause, was only a rule of court introduced for the benefit of the party, the full benefit of which the defendant had had in this instance. *Milbourn v. Nixon and others. 2 Term Rep. 40.*

Give the rule the last day of the term, and demand plea ; if no plea, sign judgment after the four days are expired, exclusive.

Searching for Plea.

TO be searched for at the clerk of the papers in *Symond's Inn*, who keeps two books, by the plaintiff's name ; if you find no plea there, search with the clerk of the judgments, at the *King's-Bench* office, who keeps the general issue book ; and if there is no plea, sign judgment ; the form of which see under title *Judgment by Default*.

Pleas in Abatement.

When to be pleaded.

PLEAS to the jurisdiction of the court, or in abatement, ought to be pleaded before the rule for pleading is out, and cannot be pleaded after a common impar lance, or unless the declaration be delivered after term, or so late in the term, that the defendant is not bound to plead to it that term ; in both which cases the defendant may within the *first four*

four days inclusive of the next term, plead any plea in abatement, or to the jurisdiction of the court, as of the *preceding term*; but if such plea be not delivered, or left in the office in time (whether a rule to plead be given or not) such plea is not to be received. *N. on R. E. 5 Ann.*

Sunday.

Sunday, or any day in which the court does not sit, is to be accounted as one of the *four days*, unless it happens to be the last day. *Ibid.* In that case, the plea may be filed on the *Monday*, otherwise as no plea can be filed on the *Sunday*, the time would be limited to three days in such cases. *Lee v. Carlton, 3 Term Rep. 642.*

And it may be pleaded by attorney. *1 Ld. Ray. 509.*

Four days to plead in abatement, are both inclusive.

Declaration was delivered the 16th *May*, and the 20th the plea in abatement was filed. Plaintiff signed his judgment, alledging it ought to have been filed the 19th. *Court*: All pleas to the jurisdiction, and in abatement being dilatory, ought not to be favoured; and that the *four days* allowed for pleading them, are both to be *reckoned inclusive*. Rule why the judgment should not be set aside, discharged. But the defendant had leave to plead the general issue on the payment of costs. *Jennings v. Webb. 1 Term Rep. 277.* The determination in *Roberts v. Williams, M. 22 Geo. 3.* Mr. J. Buller said, the *four days* are both *inclusive*.

Leave to plead the general issue.

If the defendant plead in abatement, he dispenses with the rule.

Writ returnable 6th *February* 1787, declaration filed the 7th, and a rule to plead given same day: But notice was not delivered till the 8th, and the plea filed the 15th in abatement, plaintiff signed judgment the 16th. Rule to set it aside for irregularity. It was contended, that the rule to plead being given before notice of declaration served, was irregular; but the court said, the party may undoubtedly dispense with the rule to plead. And here the defendant has superseded the necessity of a rule to plead, by pleading in abatement. Rule discharged. *Brandon v. Payne. 1 Term Rep. 690.*

In every plea to the jurisdiction, another jurisdiction must be stated. *Moslyn v. Fabrigas. Cowp. Rep. 172.* As to jurisdiction.

A plea in abatement cannot be pleaded before the defendant appears, because he does not answer to the process of the court, which formerly was returned and read at the bar. If he appeared, the countor read the writ to the court in his presence, and he was to plead in *four days*, unless special leave was given by the court; because the person coming in by process of the court, ought not to have time to delay the plaintiff. *Gilb. C. P. 52.* Cannot be pleaded before appearance, and why.

And before such plea be pleaded, the declaration must be taken out of the office, or the plaintiff may sign judgment. *N. on R. T. 12 W. 3. M. 10 Geo. 2. Reg. 3.* Declaration must be taken out.

As pleas in abatement enter not into the merits of the cause, but are dilatory, the law has laid the following restrictions on them: 1st, by 4 & 5 Ann. c. 16. "No dilatory plea shall be received, unless the party, by affidavit, prove the truth thereof, or show some probable matter to induce the court to believe that it is true." 2d, That no plea in abatement shall be received after a respondeas ouster, for then they would be in infinitum. 2 Saund. 41. 3d, That they are to be pleaded before imparlance, except where the declaration is delivered too late. 4th, That when issue is joined on them, if found against the defendant, the judgment shall be peremptory. 2 Show. 42. 6 Mod. 326. 2 Wils. 367. *Eicborne v. Le Maitre.* And therefore the jury ought to assess the damages, and the judgment shall be *quod recuperat*, because the defendant chusing to put the whole weight of his cause upon this issue, where he might have had a plea in chief, is an admittance that he had no other defence. 10 Mod. 112. Str. 532. An affidavit is necessary wherever you plead to the jurisdiction. 2 Lord Raym. 1418. Rules laid down for pleading in abatement.

On a plea in abatement no advantage can be taken of the errors in the declaration; for nothing but

R

but

but the writ is then in question, and nothing else is pleaded to. *Carth.* 172. 3 *Lev.* 351.

No need to lay
a venue.

In pleas in abatement which relate to the person, there is no necessity of laying a *venue*, for all such pleas are to be tried where the action is laid. *Salk.* 4. *Pl.* 14. *Carth.* 363. 12 *Mod.* 125. 195.

If the defendant omits to plead a *misnomer* in his right name, he may be taken in execution by his *wrong name*. *Str.* 1218. *Crawford v. Satchell*.

Cannot plead
two dilatory
pleas.

A defendant cannot plead two dilatory pleas, nor will the court suffer a plea in abatement to be amended.

A plea in abate-
ment must be
signed.

A plea in abatement must be signed by counsel, and filed with the clerk of the papers; and without an affidavit annexed to it, judgment may be signed.

May amend.

If the defendant plead in abatement of his *Surname*, or *Christian name*, the plaintiff may have a summons to amend his declaration, upon payment of costs, which saves the entry of a *cassetur billæ*: but if the plaintiff thinks proper to enter up a *cassetur billæ*, then it is to be done thus: get a roll, enter a memorandum of the *term the declaration is delivered*, and the plea at the foot thereof; (then say) And thereupon the said *T. W.* says, that he cannot deny the said exception of the said *J. R.* above by his plea taken to his said bill, but admits the same to be true; therefore it is considered by the court of our said lord the king, before the king himself, that the said bill of the said *T. W.* be quashed, &c.

Judgment of
cassetur billæ.

The roll is to be taken to the clerk of the judgments and docketed, pay *4d. per sheet*, and the master marks the *cassetur billæ thereon* when the entries are paid for; take same to *Westminster* to the clerk of treasury, and file it; then you may proceed a-new.

Oyer.

OYER of a deed, is when a man brings an action Oyer. upon a deed, bond, &c. and the defendant appears and prays that he may hear the bond, &c. wherewith he is charged, read to him, and the same shall be allowed to him.

Formerly the practice was to demand oyer of the original before plea: but Lord *Mansfield* has said that such demand was used merely for delay, and was not warranted by any rule or principle of justice. For that it was incumbent on the court to make their proceedings as little dilatory, oppressive, and expensive as possible: That it was unnecessary for the defendant to see the original, after he had been informed of the cause of action by the declaration. That the court of common pleas had rejected the practice; and that from thenceforth plaintiffs might proceed as if such demand of oyer had not been made. *Boats v. Edwards. Dougl. 228.*

Practice formerly to demand oyer of the original, but not now.

If the plaintiff in his declaration sets forth a *profert in curia* of any deed, writing, letters of administration, or the like, the defendant may pray oyer, and must have a copy thereof delivered to him, paying for the same after the rate of 4d. per sheet, and also for the stamps, and shall have such time to plead after the delivery, as he had when he demanded oyer. *Str. 705. Powel v. Gay.* So likewise if the defendant, in his plea, make a *profert* of any deed, &c. the plaintiff may pray oyer, and shall have a copy at the like rate, and the same time to reply as he had at the time of demanding oyer. *N. on R. T. 5 & 6 Geo. 2.*

If a deed is set forth, the defendant may have oyer, and what time to plead.

If oyer is granted of an instrument or record, and is set forth, although the party was not entitled to such oyer, yet he shall be thereby entitled to take the whole instrument as part of his adversary's plea. *Dougl. Rep. 477. Jeffery v. White.*

Two days.

To an action of trespass, the defendant pleaded a justification on a deed which he set out, that, on *Friday* evening, plaintiff demanded oyer and copy; which not being complied with on the *Monday* following, he signed judgment. *Mr. J. Ashurst*, The defendant has *two days* in which to give oyer and copy of the deed, which are both reckoned *exclusive*; and the party of whom oyer is demanded, must carry it to the opposite party. In the present case, the judgment was signed before the expiration of the two days, and therefore it is irregular. *Page v. Divine and others. 2 Term Rep. 40.*

Mr. J. Buller, It is within time if craved *before* the rule to plead is out, and you have no right to oyer of a record. *1 Mod. 69. The King v. Amery, Term Rep. 2 V. 150.* In this court oyer may be demanded after imparlance. *12 Mod. 99.*

Oyer of deed
not to be dis-
pens'd with.

Oyer of a deed not to be dispensed with, though shewn to be lost; for it is the plaintiff's fault to bring the action before he had the deed, or a proper discovery. *Soresby v. Sparrow. Str. 1186. 1 Wils. 16.*

If oyer is demanded before a judge's order expires, I think it is within the rule.

Anciently made
in court.

Demand of oyer was anciently made in court; but now it is made by one attorney of the other. *Mod. Ca. 28.*

Demand of oyer.

A. B. against C. D. the defendant, demands oyer and copy of the writing obligatory in the declaration mentioned, and of the condition thereof. Your's, &c.

I do not think it necessary to be given on stamps.

pleas in Bar.

THEY are to be pleaded within the time mentioned in the *R. Tr. 1 Geo. 2. & 22 Geo. 3;* and the *general issue* is either to be engrossed on a treble penny paper, and delivered to plaintiff's attorney, or entered in the general issue book, with the clerk of the judgments. Pay him *6d.*

It

It is ordered, that, in all causes depending in this court, the defendant's attorney shall receive and pay for a copy of the declaration, whether the same be delivered by the plaintiff's attorney, or left in the office, before the defendant be admitted to plead. *R. M. 10 Geo. 2.* and for want of taking it out of the office, judgment may be signed.

Copies of declarations to be paid for, whether delivered or filed.

If defendant pleads specially, it is to be engrossed and filed with the clerk of the papers, and signed by counsel (except the following) *comperuit ad diem* to a bail bond, *son assault demesne, plene administravit* by an executor or administrator, *riens per discent, nul tiel record, per minas, soluit ad diem, ne unques executor, infra etatem.* These are termed common pleas, and so held to be in that court. *Cooke's Cases 41.* But

If defendant pleads specially, to be filed with clerk of the papers.

if any of these pleas require a special replication, that should be signed by counsel, and filed with the clerk of the papers, who is to make up the paper book on a copy of the plea being delivered to him. In order to plead two or more matters, it is not necessary that affidavit be made of the facts; and the defendant, by leave of the court, may plead as many pleas as he shall think necessary. *Stat.*

May plead as many pleas as necessary.

4 Ann. c. 19.

It is ordered by the court, That no special pleas or demurrers in law, in any cause here in court now depending, or hereafter to be prosecuted, shall be received by the clerks of the papers of this court, before such pleas or demurrers in law shall be signed with the proper hand of some counsel in that behalf retained. *R. T. 18 Car. 2.*

Clerk of the papers to receive no special pleas or demurrers before signed.

That no attorney deliver or receive any special plea to be put into the office of the clerk of the papers, or a copy of such plea, before that such plea shall be put into the office of the clerk of the papers, and that such copy shall be made by the clerk of the papers. *R. M. 2 W. & M.*

No attorney to deliver any plea that ought to be filed, or received.

If you plead double, a brief must be given to counsel, naming your plea for that purpose, which he signs of course; pay him *10s. 6d.* carry it to the clerk of the rules, with the plea, who will

How to plead double.

draw up the rule, and serve copy on plaintiff's attorney.

N. B. If you are not in time, file your plea first, and serve the copy of the rule after on the attorney.

May have a
summons for
time,

If defendant cannot be ready to plead by the time the rule expires, he may apply to a judge for a summons for time; a copy of which is to be served on the plaintiff's attorney; attend the judge, and he will make an order (but amongst fair practisers a consent is generally procured), and it must be upon terms, if the plaintiff is in time to try his cause, "*of pleading issuably, rejoining gratis, and taking short notice of trial for the last sittings in term or after,*" as the case happens; but it is to be remembered, that no plea but an *issuable one*, can after an order obtained, be pleaded; therefore a recovery in a former action will not be a proper plea after an order obtained. 2 Burr. 782.

Judgment recovered, not an
issuable plea.

Amendment.

Of amending Declarations, and other Pleadings.

FORMERLY the suitors were much perplexed by writs of errors, brought upon very slight and trivial grounds, as mis-spellings, and other mistakes of clerks, all which might be amended at the common law, whilst all the proceedings were in paper. 1 Burr. 322. For they were then considered only *in fieri*, and therefore subject only to the controul of the courts; but when once the record was made up, it was formerly held, that by the common law no amendment could be permitted, unless within the very term in which the judicial act so recorded was done; for, during the term, the record is in the breast of the court; but afterwards it admitted of no alteration, Co. Lit. 260. Now the courts
are

are more liberal, and, where justice requires it, will allow of amendments *at any time whilst the suit is depending, notwithstanding the record be made up, and the term past*; and the court will always take care that if one party obtains leave to amend, the other will not be prejudiced nor delayed thereby. 2 Burr. 756. *Alder v. Chip.*

The statutes are 14 Ed. 3. c. 6. 8 H. 6. c. 12. & c. 15. the purport of which is, that the judges may amend in any *record, process, word, plea, warrant of attorney, writ, panel, or return, all that which seems to them to be the misprision of the clerk (except appeals, &c. and outlawries of the same).*

All the other statutes, which are more extensive in their nature, are held to be statutes of *jeofail*.

The statutes of amendment only extend to pleadings of *record*; so that when the proceedings are *plainly upon record*, and are known to be so by the court, no amendment therein can be made (except such as are warranted by the statutes of amendments).

In general, *process* may be amended, where there is any thing to amend by. 1 Term Rep. 782.

By rule Mich. 1654. s. 13. the plaintiff may amend his declaration, paying costs, or giving an imparlance, at the plaintiff's election, by the order of court, or of a judge, after it is entered, if the amendment be but a small matter, that it doth not deface the roll. May amend without imparlance.

A declaration may be amended in matter of form, after a general issue pleaded, and before entry, without paying costs or giving an imparlance; but if amended in substance, the plaintiff must pay costs, or give an imparlance; and if the amendment be *in substance* after a *special plea* pleaded, the plaintiff must pay costs, though he had rather give an imparlance. In matters of form, after plea without costs.
In substance not.
 And in all cases of amendment after plea pleaded, the defendant has liberty to plead again, and *has two days* for that purpose after the amendment made and payment of costs. *N. on R. M. 10 Geo. 2. 2 Str. 950.*
 If a rule to plead be entered the same term the amendment is made (before such amendment), it is No new rule necessary.

sufficient, otherwise a new rule to plead must be entered. *Ibid.*

Shall not add a new count.

The plaintiff, after plea pleaded, or after the end of the second term, shall not add a new count to his declaration, under pretence of amending. *1 Wils. 149. Aubeer v. Barker.*

Two days after amendment to plead,

If plaintiff amend his declaration, the defendant shall have *two days*, exclusive of the day of amendment, to alter his *first plea* or plead any other. *N. on R. T. 5 & 6 Geo. 2.*

No amendment after two terms by adding a new count.

Application was made to amend by adding *two counts* the term next after the term in which declaration was delivered, and after defendant had pleaded, refused. *Aubeer v. Barker. 1 Wils. 149.*

Qui tam action

Where a *qui tam* action for usury had been depending four years, the court refused to amend in dates and sums, though the proceedings were in paper. *Goff, qui tam, v. Popplewell. 2 Term Rep. 707.*

May file a new bill to amend by. Amendment after demurrer.

Leave was given to file a new bill to amend by. *Str. 583. Russel v. Martin.* And a declaration was amended by the bill filed, after special demurrer and argument. *Bishop v. Stacey. 2 Str. 954.*

I have no doubt if the record is made up and passed, if either party want to amend the pleading, it will be ordered on payment of costs: For the record may be ingrossed anew, and the costs make amends, although notice of trial be given, and I have heard of such an order being made.

Defendant demurred to the declaration, summons to amend. Master was of opinion he had two days time to plead from the order.

Replication amended.

Replication was amended after verdict, by inserting the words "*and the defendant does so likewise:*" at the end of the replication, instead of, &c. *Cowp. Rep. Sayer v. Pocock.*

Bill on file may be amended.

A bill on the file may be amended at any time before plea pleaded, during the term of which it is, but not afterwards without leave of the court. *N. on R. M. 10 Geo. 2.* In the *Duchess of Marlborough v. Widmore*, the amendment was allowed on a particular

cular reason; for if it had not been there allowed, the action would have been lost by the running of the statute of limitations. 1 *Wils.* 149. *Str.* 890. *Ex. of D. Marl. v. Widmore.* It was altered by laying the promise made to the executors, instead of the testator.

Declaration *qui tam* for usury, may be amended by altering the date of a note after issue joined, while all is in paper. 2 *Burr.* 1098. *Bonfield, qui tam, v. Milner.*

So the court will give leave for a plaintiff to withdraw his replication, and reply *de novo*, which is in the nature of an amendment, and to prevent the defacing and obliterating the roll, six terms after the replication delivered. *Ibid.* 755. *Alder v. Chip.*

Court gave leave to withdraw replication, and reply *de novo*.

If on entry to avoid a fine, the demise is laid previous to the entry, and plaintiff would be barred by the fine, if he had been put to bring a new ejectment; it may be altered, on paying costs. *Doe v. Pilkington.* 4 *Burr.* 2447.

Demise in ejectment amended.

The term in ejectment being near expiring, it was amended without any consent. 2 *Str.* 1272. *Oates v. Shepherd.*

If plaintiff declares as executor, on a promise to the testator, and the statute of limitations pleaded, and issue joined, plaintiff may on motion amend, by laying the promise as made to himself, on payment of costs, and liberty for defendant to plead *de novo*. *Str.* 890. *D. of Marl. v. Widmore.*

Amendment by laying the promise as made to the executor.

A bill of *Middlesex* filed of record as of the 24 *Geo.* 3. when it ought to have been of the 25th, may be amended agreeable to the truth. *Green v. Rennet, Term Rep.* 1 *V.* 782. There is a distinction between amending those mistakes which are occasioned by the act of the party, and those which are occasioned by the act of the clerk. As in the case of execution, if the clerk enter judgment *de bonis propriis*, instead of *de bonis testatoris*, and error is brought, this court will order the entry to be amended, even if the record is sent back from the Exchequer-chamber. *Ibid.* Per Buller, J.

After

After argument on demurrer, and before the court gave judgment, leave was given to amend. *Str.* 954. *Bishop v. Stacey.*

And I have known the issue-roll amended by a judge's order after filed, in point of substance.

The amendments may be made by a judge's order before issue entered on record, to obtain which you must first have a summons, and serve it on the attorney for defendant.

Pleas and replications may also be amended in the same manner. *Lord Ray.* 1441.

After verdict.

After verdict found on some issues, and demurrer argued as to others, application made to withdraw the demurrers and plead, court refused. *1 Burr.* 316. *Robinson v. Rayley.* The court will not allow the plea to be amended after demurrer, when plaintiff has lost a trial. *Rep. in Temp. Hard.* 171.

Variance in the name of attorney.

A variance between the name of the attorney for the plaintiff in the warrant on the roll, and in the memorandum of the issue, was suffered to be amended after error brought, and the variance assigned for error on payment of costs of the writ of error. *Richards, qui tam, v. Brown.* *Dougl.* 114.

After verdict and joinder in error.

Verdict on the first issue, and no notice taken of the last, after error and joinder in the house of lords; this court allowed it to be amended by the judge's notes on payment of costs. *Petrie v. Hannay, Bart.* *3 Term Rep.* 659.

Another amendment after assignment of errors.

On a writ of error in the exchequer chamber, it was assigned for error, on a judgment, on a demurrer to the plea, that the damages *occasione detentionis debiti* were not said to be awarded *ex assensu suo*; and *Pengelly C. B.* having doubts whether the case was within 16 & 17 *Car.* 2. c. 8: s. 1. the court of *B. R.* was moved, and amended the judgment in the original record, and the transcript being afterwards amended, the court of exchequer chamber affirmed the judgment. *Tully v. Sparkes,* 2 *Str.* 869.

Continuances.

The entering of continuances, or other ministerial acts, are amendable after the term at common law. *1 Str.* 139.

A ca-ja

A *ca-fa* may be amended after executed by the *Ca-fa*. judgment roll in the return, and made to a right day, although it stated a wrong one in the term. This was ordered in *Trinity term*, 31 Geo. 3. and the rule absolute in the first instance, *Vide 2 Black. Rep.* 836. and *Barnes* 10.

Mutual Debts.

AT common law, if the plaintiff was more indebted to the defendant, than the defendant was indebted to him, yet the defendant had no method to strike a balance, he could only go into a court of equity for doing of what is most clearly just and right to be done; and in order to prevent such expence, by *stat. 2 Geo. 2. c. 22.* it is enacted,

"That where there are mutual debts between the plaintiff and defendant, and if either party sue, or be sued as executor or administrator, where there are mutual debts between the testator or intestate, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case requires, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator, or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon such general issue." Mutual debts may be set off.

8 Geo. 2. c. 24. enacts, "That mutual debts may be set against each other, either by pleading in bar, or given in evidence on the general issue, in the manner as in the 2 Geo. 2. c. 22. mentioned, notwithstanding that such debts are deemed in law to be of a different nature, unless in case where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty; and in all cases where either the debt for which the action hath been, Mutual debts may be set off; unless on bond, then to be pleaded.

" or

“ or shall be brought, or the debt intended to be set
 “ against the same both accrued; or shall accrue by
 “ reason of any such penalty, the debt intended to be set
 “ off shall be pleaded in bar; in which plea shall be
 “ shewn how much is truly and justly due on either
 “ side; and in case the plaintiff shall recover in any
 “ such action or suit, judgment shall be entered for
 “ no more than shall appear to be truly and justly
 “ due to the plaintiff, after one debt being set
 “ against the other as aforesaid.” Made perpetual,
 14 Geo. 2. c. 34. 21 Geo. 2. c. 33. 24 Geo. 2. c. 28.

Real sum due to
 be set out in plea
 of set-off.

It hath been holden, that in an action on bond,
 the defendant must set forth in the plea what is
 really due on the bond, before he is entitled to set off
 under this statute, and such averment is traversable.

Symonds v. Knox. 3 Term Rep. 65.

Mutual debts
 between a bank-
 rupt and any
 other person,
 how to be set off.

By 5 G. 2. c. 30. “ Where it shall appear to the
 “ commissioners, that there has been mutual credit given
 “ to the bankrupt and any other person, or mutual
 “ debts between the bankrupt and any other person, at
 “ any time before such person became bankrupt, the
 “ commissioners or the assignees of the bankrupt's estate,
 “ shall state the account between them, and one debt may
 “ be set against another, and what shall appear to be
 “ due on the balance, and no more, shall be claimed or
 “ paid on either side.”

Cannot set off
 in replevin.

In replevin, the avowant justified under a distress
 for rent; the plaintiff at nisi prius insisted, that
 there was more due to him than the rent amounted
 to, and *Dennison J.* refused the evidence; upon
 motion for a new trial, the court held that 2 Geo. 2.
 did not extend to the case of a distress, for that it
 was not an action, but a remedy without suit; they
 likewise declared, that it did not extend to detinue
 and the like actions of wrong. *Bull.* 177.

If the debt is
 of an equal sum,
 action barred.

Where the debt is of an equal sum, there the
 action is barred; but if it be for a less sum than
 for what the action is brought, the defendant must
 pray to have it set off. *Ibid.* 175. *Cooke v. Dix*
 1735.

If the defendant's demand does not countervail the plaintiff's, he should move the court wherein the action is depending, for leave to pay so much money into court, as with his own demand will be sufficient to satisfy the plaintiff's.

Defendant may move to pay money into court, and set off.

Defendant pleaded the general issue, but forgot to give notice at the same time of a set-off, and upon motion in time, the court gave leave to withdraw the plea, in order to deliver it again with a notice of set-off. *Say. Rep. 316.*

The notice of set-off should contain certainty; for the legislature designed them to be in the nature of cross actions, and therefore they should have that certainty, so that the plaintiff may be able to make a proper defence.

Notice should contain certainty.

A set-off reducing the plaintiff's demand under 40s. does not affect the jurisdiction of the superior courts. So that if plaintiff recovers 1s. damages, he must have costs. *Str. 1191. Pitts v. Carpenter, 3 Wils. 48.*

Set-off reducing demand under 40s.

As the defendant is entitled to the particular of the plaintiff's demand, it is now the practice, that the plaintiff should have a particular of the defendant's demand, in which he means to set off. This is done by summons; and if such particular is not delivered within the time limited by the order, the defendant is precluded going into his set-off.

Defendant intitled to a particular of plaintiff's demand.

Where the defendant lent his acceptance to the bankrupts on a bill which did not become due until after the act of bankruptcy, and was then outstanding in the hands of third persons; yet the defendant having paid the amount after the commission issued, and before the action brought by the assignees is intitled to set off the same, under the words *mutual credit* in the 5 Geo. 2. c. 30. s. 28. *Smith and others v. Hodgson. 4 Term Rep. 211.*

Bankrupt.

To an action on a promissory note, the plaintiff took a verdict for the whole sum; the defendant had, at the same sittings, an action against the plaintiff for eleven pounds, to which there was a notice to set off the note of hand; court held, that

Two causes tried at same sitting, plaintiff took a verdict for his whole sum; and held, that he might still make a set-off, and

not- a set-off, and

after enter a
remittitur.

notwithstanding the verdict, the note of hand might be set off, for if, at the time of the action brought, there are mutual demands, they, by the statute, may be set off, and justice may be done by entering a *remittitur* on the first record as to so much. 2 Burr. 1229. *Baskerville v. Brown, et é contra*.

In what actions
there may be a
set-off.

a Bull. nisi pri.

175.

b 2 Burr. 820.

c Bull. 75.

d Ibid. 177.

Debt upon a simple contract may be set off against a specialty debt^a, a simple contract against a debt upon an annuity bond^b, mutual debts between the testator and executor, without suit^c, simple contract against debt upon a lease for non-payment of rent^d, and all actions where the demands are of the same nature, may be set off, and a judgment in *K. B.* may be set off against a judgment in *C. P.* 3 *Wils.* 396. but notice of set-off need not be given by defendant, in an action for money had and received to plaintiff's use, where defendant had paid plaintiff his whole demand (except what he retained for his labour and service). 4 Burr. 2133. *Dale v. Sollat*.

In what cases a
set-off cannot be
pleaded, or no-
tice given.

e Bull. 175.

f Ibid.

g Bull. 175.

h Ibid. 177.

But debt due to a man in right of his wife, in an action against him, on his own bond, cannot be set off^e, nor can a penalty upon articles of agreement, though forfeited^f, nor simple contract for cloaths to a bail-bond^g, nor can there be a set-off in replevin, though the distress was taken for rent^h, nor can a bond be set off at the suit of assignees of a bankrupt, to an action by them, for goods sold and delivered. 1 *Wils.* 155. *Ryal et al. v. Larkin*.

May set off to
an action at a
assignees of
a bankrupt,

In an action brought by the assignees of a bankrupt for money due to the bankrupt, the defendant may plead a set-off of money due from the bankrupt to him: but if some of the counts are for debts arising since the bankruptcy, he cannot plead a set-off as to those counts. *Ridout v. Brough. Cowp. Rep.* 133.

The plea of
set-off must state
plaintiff's being
indebted at the
commencement
of the suit,
and not at the
time of the plea
pleaded.

It is said, that a judgment obtained by a defendant against the plaintiff after declaration delivered, and before plea pleaded, may be pleaded as a set-off. *Reynolds v. Beerling, cited in Dougl. Rep.* 112. And that, although it do not appear, that the cause of action, on which the defendant's judgment was ob-
tained,

tained, was prior to the commencement of the plaintiff's action. But in *Evans v. Prosser*, it was determined, that a plea of set-off, that plaintiff was indebted to the defendant at the *time of the plea pleaded*, is bad; and that it should state that he was indebted at the commencement of the action; and Buller Justice said, that on looking into the case of *Reynolds v. Beerling*, he found, that on the point here stated, it could not be supported. 3 Term Rep. 186.

Where a partner or executor brings an action in his own right for money received after the death of the other partner or testator, the defendant may set off whatever was due to him from the plaintiff.

Smith v. Barrow, 2 Term Rep. 476.

A debt barred by statute of limitations cannot be set off; if pleaded, the plaintiff may reply the statute; if it is given in evidence, plaintiff may object to it. *Bull. 176. Str. 1271. Remington v. Stephens.*

A defendant may, after pleading the general issue, move to withdraw it, and plead a-new with a set-off. *Str. 1267. Blackburn v. Matthias. Term Rep. 1 V. 693.*

A broker with a commission *del credere*, cannot prove, under a notice of set-off, a loss upon a policy happening before a bankruptcy, in an action by the assignees of the bankrupt for premiums upon policies underwritten by him, and for which he had debited the broker; but such a loss may be set off under the general issue. *Grove v. Dubois, 1 Term Rep. 112. Vide 28th sect of 5 Geo. c. 30.*

A judgment in the *King's Bench* may be set off in the *Common Pleas*, and the balance, due to plaintiff, ordered to be paid, upon motion. 3 *Wils. 396. Barker administrator, v. Braham.*

A debt barred by statute of limitations, cannot be set off.

May, after plea of general issue, move to withdraw and plead a-new.

A broker with commission *del credere*, cannot prove a loss under notice of set-off.

Judgment in *K. B.* may be set off against one in *C. P.*

Of paying Money into Court.

Why introduced. **T**HIS practice was introduced for the sake of giving a party (who never had it in his power to make a tender, or neglected to make one) an opportunity of satisfying the debt for which the action had been commenced, and likewise to deliver him from the necessity of proving the tender, if he had made one.

When the dispute between the parties is not whether any, but what sum of money is due to the plaintiff, it is necessary that so much as is acknowledged by the defendant, be brought into court; that is, paid into the hands of the proper officer for the use of the plaintiff, who may at any time either before or after trial, though nonsuited, receive the same, the defendant having confessed so much to be due.

May take an objection to the action, though money be paid into court.

Payment of money into court is only an acknowledgment that the plaintiff is intitled to recover the sum so paid; but it does not preclude the defendant from taking any objection to the action beyond that sum; though, unless such sum were paid, such objection would be a bar to the plaintiff's action. *Cox and another v. Parry*, 1 Term Rep. 464.

May be paid into court before plea and not after, by a judge's order.

Buller J. Where the defendant is intitled to pay money into court, it is a matter of course before plea pleaded, 1 Wils. 157. and now, even after plea, it is perpetually done by obtaining a judge's order for that purpose. No inconvenience ensues to either party from this practice; because, if any expence has been incurred, that is ordered to be paid at the time of obtaining the rule. And this tends to the furtherance of justice; for if the defendant pays into court what is really due, the plaintiff ought in justice to really take it. That is the case in general. *Griffiths v. Williams*, 1 Term Rep. 710.

In what actions money may be paid into court.

Money may be paid into court in all actions where the sum demanded is a sum certain, or capable

pable of being ascertained by mere computation, without leaving any sort of discretion to be exercised by the jury: it is right and reasonable to admit the defendant to pay the money into court, and have so much of the plaintiff's demand upon him struck out of the declaration; and that if the plaintiff will not accept it, he shall proceed at his peril. 2 Burr. 1120. *Hallet v. East Ind. Co.*

In actions on the case upon *indebitatus assumpsit*, So in these actions, where there is a *quantum meruit*, Str. 576.; debt for

rent; covenant for non-payment of rent, *Barnes* 198.; but not for repairing, *Salk.* 596.; covenant in a sum certain, as 11*l.* for not dressing corn, 2 *Barnes* 229.; 5*l.* for advanced rent for ploughing meadow ground, 2 *Black. Rep.* 837.; replevin, where defendant avows for rent in arrear, *Salk.* 596.; ejectment for rent, *Stat.* 4 *Geo.* 2. c. 28.; non-payment of mortgage-money, Str. 413.; upon a charter-party of affreightment, where the breaches are only for freight and demurrage, 2 Burr. 1120. *Trover* for *Trover,*

goods not being ponderous, the plaintiff has been ordered to shew cause why he should not accept them, *Barnes* 200.; *trover* for money, 1 Str. 142. So in *trover* for a specific chattel, of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damage above its real value, but that its real and ascertained value must be the sole measure of the damages, 3 Burr. 1344. *Fisher v. Prince.* Debt for 5*l.* for killing a hare, Str. 1217.; for penalties on the game laws, being an action popular, 2 *Black.* 1052.; upon a policy of assurance, *Stat.* 19 *Geo.* 2. c. 37. s. 7.; may be brought into court upon the common rule of course, and also at the suit of an executor, Str. 796; but in covenant upon a charter-party, where the breach is not for payment of money, and *trover*, and debt for a penalty, the court must be specially moved upon an affidavit of the facts. When court must be specially moved.

Formerly the defendant, in an action of debt Upon bond, money may be paid into court, upon bond, who had obtained the common rule, must have brought the whole penalty into court;

S

but

but now this hardship is remedied by *Stat. 4 Ann. c. 16. s. 13.* whereby it is enacted, *That if, pending an action upon a bond, with condition to be void upon payment of a less sum, the defendant shall bring into court all the principal money, and interest due, and costs; the said money shall be taken to be a full satisfaction of the said bond, and shall discharge defendant.*

Construction of
the act.

This act of parliament reforms in some instances an *erroneous* course of proceeding in the courts of law and equity, which ought never to have prevailed, and which the courts themselves *might* and *ought* to have remedied, but did not. Therefore it should not only have the most *liberal* construction; but the courts ought to exercise their *own* authority, to *extend* the spirit and reason of this parliamentary interposition, “for the *easier, speedier, and better* “*advancement of justice*” to cases *not mentioned* in the act. This act meant, that in cases of *penalties* by way of *security*, the clear final justice of the case should be attained in courts of *law*.

Court gave liberty to pay arrears, the judgment standing as a security.

The condition of a bond was to pay 40*l.* by 5*l.* *per annum*. An action was brought, and on motion the court gave liberty to bring into court the arrears on payment of costs. 2 *Str.* 814. *Bridges v. Williamson*. And it has since been held, that paying all past installments with interest and costs is sufficient; and money not yet due was ordered to be paid to the party who brought it in. *Str.* 957. *Darby v. Wilkinson*. And the court held, that it is but reasonable they should take care not to prejudice the plaintiff, who will have a legal advantage by signing judgment; therefore ordered him to sign his judgment, but not to take out execution, until the payments became due. *Str.* 958. *S. C.*

In what actions money cannot be paid into court.

a Qu. If it cannot now be done?

This in vacation time, may be done by summons. *Actions on the case for immoderately driving a hired chaise, and for consequential damages, Str.* 787.; *trespass for the mesne profits in ejectment, 2 Will.* 115.; *for dilapidations, Str.* 906.; *debt upon a bond to a sheriff conditioned for the good behaviour of his bailiff; and, inter alia, for paying money collected for the sheriff's case;*

case; upon a bond for the performance of a collateral agreement; upon a counter bond; trespass for taking goods; replevin, where it is not for rent; for injuring common by burning turf, in account, money cannot be brought into court.

Payment of money into court, where the demand is for *unliquidated* damages by a judge's order after plea, is irregular; but if the plaintiff take the money out, he waives the irregularity, and cannot afterwards have a verdict, unless he recover more than the sum paid in. This was an action for negligence. *Griffiths v. Williams*, 1 Term Rep. 710.

Demand for unliquidated damages.

Money may be brought into court in debt for an annuity, 3 Burr. 1373; but where a bond is given for a gross sum, absolutely at a day certain, viz. April 1750, and an agreement in January 1758 was entered into, that the money should be payable by installments, with proviso that the sums agreed to be taken by installments should be *punctually and regularly* paid by defendant, at and upon the *very days* specified in the defeazance for making the respective payments, otherwise to be void; yet where defendant made two payments good, and neglected one, the court would not allow him to bring that sum and costs into court: 3 Burr. 1370. *Bonafous v. Rybot*.

May be brought into court in debt for an annuity: But not if there be an agreement to pay absolutely at a day certain.

After refusal or issue joined, plaintiff may have the money out of court, and costs to the time of paying in, he paying defendant the subsequent costs.

By rule 5 Jac. 1. 20s. for every 100l. to be paid to the secondary of the chief clerk for keeping the money, if under 10l. two shillings, and so according to that rate for every greater or lesser sum.

Chief clerk's fees.

If plaintiff's attorney takes the money out of court, he must get an office copy of the rule, pay 3s. take same to Messrs. *Provest* and *Webb*, who will pay the money, deducting the poundage and receipt.

Cur. gave leave to withdraw the general issue in order to bring money into court, and plead it, not delaying the plaintiff. *Str.* 1271. 1267. *Say.* 316.

Method of paying money into court.

In order to pay the money into court upon actions, where there can be no doubt but that you may pay the same in; give instructions to counsel for that purpose, with 10s. 6d. indorsing thereon, "*please to move to pay 2l. 5s. into court,*" and on his signing it, take it to Messrs. *Provost* and *Webb*, pay the money to them who, will give a receipt, pay 2s. 4d.; and poundage, 20s. for every 100l.; if under 10l. 2s.; besides the receipt, 2s. 4d.; then take brief and receipt to the clerk of the rules, he will draw up rule, pay 6s. and 1s. to the box; serve copy on plaintiff's attorney, and at the same time, deliver plea; if plaintiff accepts the money in full discharge of his suit, he must have costs taxed to the time the money is paid into court.

If plaintiff accepts it, how to proceed.

If he accepts the money.

If he accepts the money, and does not proceed for further damages, it is now the practice for him to take an office copy of the rule, and obtain an appointment from the master, and serve same on the defendant's attorney to tax the costs; and if after taxation the defendant does not pay same, the plaintiff may deliver his issue with notice of trial, and proceed to obtain a verdict, and 1s. damages will carry the costs on producing an office copy of the rule in court and the master's *allocatur* for costs. If he means to proceed for further damages, he may obtain an office copy of the rule, take the money out of court, and then deliver the issue and proceed to the trial.

N. B. If the money is to be paid into court a week after the term ended, then a judge's order is requisite to authorize the clerk of the rules to draw up the rule; but in this case a counsel's hand is requisite to a brief for that purpose, as the order states, that the clerk of the rules be at liberty so to do, on producing a counsel's hand for that purpose.

The plaintiff to procure the appointment.

Notice is hereby given, that in case any defendant shall pay money into court under the usual rule, and the plaintiff shall be willing to accept thereof with costs, the said plaintiff's attorney shall upon an office copy of such rule procure an appointment from the master to tax such costs, and serve the same on the defendant's attorney, and in default thereof it shall be considered that the plaintiff intends to proceed

ceed in the action to recover a larger sum, than that paid into court. *Kabell v. Hudson.* 4 Term Rep. 11.

In *assumpsit* the defendant brought 8*l.* into court on the usual terms of paying costs to that time; the plaintiff took it out, and taxed his costs, and served the defendant's attorney; and they not being paid, went on to trial, and obtained a verdict for 7*l.* 18*s.* The defendant insisted that he should have no costs for his subsequent proceedings, since it appeared that he was overpaid; but the court held, that as to the costs, it was to be considered as if no motion had been made, the defendant not having fulfilled the terms of her own rule, in which case it is not usual to grant an attachment; but the plaintiff goes on, it being only a conditional rule. They said they would make him allow, upon the execution, the 8*l.* he had taken out of court, and ordered him the *posse* to tax his whole costs. *Str.* 1220. *Hand v. Lady Dineley.*

If the costs are not paid on bringing money into court, the plaintiff must go on, and cannot have an attachment.

There may be circumstances arise, that money may be paid into court without being subject to costs; as where a plaintiff kept out of the way to prevent a tender, and upon summons before a judge to pay debt and costs, his attorney pretended he had other demands, and so refused to name the sum, which obliged defendant to pay money into court, and apply to the court that so much of the rule as related to costs might be discharged, with costs of the application; the court looked upon these proceedings to be oppressive, and discharged the rule, but not with costs of the application. 1 *Burr.* 578. *Johnson v. Houlditch.*

In what cases defendant not liable to pay costs.

Court held that an auctioneer had acknowledged himself liable to the action, by paying money into court. 5 *Burr.* 2640. *Burrow v. Skinner.*

Wednesday next after the morrow of *All Souls*, in the 32d year of *King Geo.* the 3d.

Doe. } It is ordered that the defendant have leave to bring into court 32*l.* and thereupon, unless the plaintiff shall accept thereof, with costs to be taxed by Mr. *Benton*, in full discharge of this suit,

The rule to pay money into court.

suit, the said 3*l*. shall be struck out of the declaration, and paid out of court to the plaintiff or his attorney; and upon the trial of the issue, the plaintiff shall not be permitted to give evidence for the said 3*l*. upon the motion of Mr. *Morgan*.

Duty 3*s*.
Rule 3*s*.
Box 1*s*. }

By the Court,

The meaning of
the rule.

The meaning of this rule is, That if the plaintiffs do not accept the sum brought into court, the same is to be struck out of the declaration; and the plaintiffs upon the trial, are not admitted to give evidence for the sum brought into court; and if the plaintiffs, upon the trial, do not prove *more* due to them, than the money brought into court, there must be a verdict for the defendants. *Hallett v. E. Ind. Co. 2 Burr. 1120.*

The plaintiffs are at liberty to accept a sum brought into court, in respect to breaches assigned for non-payment of freight and demurrage, and to proceed as to any other breaches mentioned in the declaration (excepting those) if they think proper. *Hallett v. E. I. Comp. 2 Burr. 1121.*

Juror with-
drawn.

If the defendant pay money into court, and the plaintiff proceed to trial when a juror is withdrawn, the plaintiff is intitled to the costs up to the time of payment of money into court. *Stodhart v. Johnson. 3 Term Rep. 657.*

The question was, whether, in an action by an executor, the defendant should be allowed to bring money into court. And on consideration it was held he might, and that the effect of it would be, not to make the executor pay, but only lose his subsequent costs. *Str. 796. Crutchfield v. Scott.*

If Plaintiff proceeds further, and wishes to accept the Money, and Costs.

If there are fur-
ther proceedings
after payment of
money into

A declaration was filed of *Easter* term; plea, and money paid into court same term. Issue delivered in *Trinity* term, with notice of trial for the 6th July.

July, which was countermanded the 3d. Application was made to the defendant's attorney for the amount of costs, down to the time of paying the money into court; with an offer to allow the subsequent costs, and settle the balance whichever way it might be; the defendant's attorney refused, insisting that he was intitled to his costs from the commencement of the action. Rule *why the master should not be directed to tax the costs of the plaintiff, to the time of paying the money into court, and the defendant's costs from that time, to the countermanding the notice of trial; and why the defendant should not pay the balance to the plaintiff.* *Per curiam*: On enquiring of the master, it appears to be the constant and regular practice, that the plaintiff is intitled to have his costs *to the time* of paying money into court, and the defendant all his *subsequent costs.* *Hartley v. Bateson.* 1 Term Rep. 629.

N. B. This now may be done by summons.

After verdict for the defendant, plaintiff moved to be allowed his costs to the time of paying the money into court. *Buller J.* Though the plaintiff was intitled to the costs up to the time of paying money into court, if application were made before trial, yet he comes too late after the trial. Rule refused. *Stevenson v. Yorke.* 4 Term Rep. 10.

Plaintiff comes too late after verdict.

Tender.

TENDER comes from the *French*, *tendre*, in *Tender*. *Latin offerre*, and in a legal sense denotes as much as carefully to offer, or circumspectly to endeavour, the performance of any thing belonging to us; as, to tender rent, is to offer it at the time and place where and when it ought to be paid; and it is an act done to save the penalty of a bond, and of money for rent, or contract, before distress or action brought. It may be made in purses, or bags, without shewing, or telling the same, for it

is the receiver's business to put it out, and tell it, *Co. Litt.* 208. a.; and it must be *by offering the bags to the plaintiff*, and not holding them under his arm. *Noy* 74. 5 *Co.* 115. And every tender at the common law, or which is given by statute, must be made *before the writ sued out*. *Brown's Tend.* 9. See 21 *Jac.* 1. c. 16. s. 5.

In an action of covenant for non-payment of rent, defendant pleaded a tender on the day. The witness proved, that defendant went purposely to pay his rent, and said to plaintiff, "*I am come to pay you for the rent,*" but did not put down or shew the money. And it being proved that plaintiff refused upon other ground than that of objecting to the *quantum*, or the *quality*, *Buller J.* held it to be a good tender in this case. *Somerset ass.* Spring 1786. *Crompt.* 152.

In *Hilary* term 1785, it was held, that a *sub-pœna* in the Exchequer being sued out before tender made, was good.

In pleading a tender in debt, defendant prays judgment *de damnis*, in case *de ulterioribus damnis*.

There is a difference in pleading a tender in an action of debt, and in an action on the case; in debt, the damages are but accessory, so that in pleading a tender to such action, "*the defendant must pray judgment of the damages;*" but in *assumpsit*, the damages are principal, and he is to plead "*semper paratus,*" with a *proferet hic in curia*, and "*pray judgment de ulterioribus damnis.*" *Salk.* 622. 3 *Salk.* 344.

Tender of goods how to be pleaded.

If a tender at the day, of corn, or of any other goods of a perishable kind, be pleaded with a refusal, there is no need to plead "*uncore pris.*" 9 *Rep.* 70. 1 *Inst.* 207.

Wherever the debt or duty arises at the time of the contract, and is not discharged by a tender and refusal, it is not enough for the party who pleads the tender to plead a tender and refusal, and *uncore pris.*; but he must also plead "*touts temps pris.*" *Salk.* 622. 12 *Mod.* 152. *Carth.* 413.

Every requisite which is in a particular case necessary to the validity of a tender must, in pleading such

such tender, be shewed to have been complied with; else the plea is not good. *Salk.* 624.

Tender of stock must be at the last part of the day *Tender of stock.* it can be accepted, *Str.* 777. and the usual hours must be set forth. *Ibid.* 832.

Formerly the plea of tender was pleaded in the same manner as a plea in abatement, *within the four days*, but the following case allows it to be pleaded *after a judge's order.* Formerly tender pleaded within four days.

Time was given by a judge's order to plead, *But now may be* until *two days before the essoign day of this present term*, on the usual terms of pleading issuably, &c. pleaded after a judge's order.

This order was not obtained till after the four days rule for pleading was expired. Before the term, and within the time allowed by the judge's order, the defendant pleaded a plea of tender, which plea was entitled as of the preceding term. *Aspinall* moved to set it aside, and for leave to sign judgment. *Winn*, for defendant, said, that it was a *fair honest plea*, in its own nature; and that it was *within time*, not being *after imparlance*, but as of the last term, and also that it was an *issuable plea* within the meaning of the judge's order; though he acknowledged that a plea in *abatement* (though in strictness indeed issuable) would not be so, because it tended to delay the plaintiff. The court concurred entirely in what *Winn* had urged in support of the regularity of the plea, and the motion was denied. *1 Burr.* 59. *Kilwick v. Maidman.*

If you wish to plead a tender, as of the next term, obtain a judge's order for that purpose. A tender is pleadable to a *quantum meruit*. Settled on demurrer. *1 Str.* 576. *Salk.* 622.

Tender to the whole declaration is good. Ruled *Trin.* 19 *Geo.* 3.

The defendant cannot be permitted to plead *non assumpsit* to the whole, and a tender as to part; because if the general issue be found for the defendant, it will then appear in the record that no debt is due, and yet that the defendant admits something to be due, *MacLellan v. Howard*, 4 *Term Rep.* 194. Non assump. to the whole, and tender as to part, cannot be pleaded.

A tender

Tender made on a day bill filed, will not assist defendant.

A tender was made actually *in the term*, and before a bill filed against the defendant. The bill was filed the same day the tender was made, and a summons taken out before Mr. J. Buller to entitle the bill (which was of *Hilary* term generally) the day it was actually filed. The judge said, that it would not assist the defendant at all, for he could not take advantage of it in pleading, there being no fraction of a day. *Hil. 30 Geo. 3.*

Fresh demand and refusal.

A right to damages, on account of non payment of a debt, or non-performance of a duty, may, after being taken away by a tender and refusal, be revived again by a demand subsequent to the tender and refusal; a new cause of action arises from the non-payment or the non-performance thereof upon such demand, 5 *Bac. Abr.* 12. *Brownl.* 71.; and therefore the plaintiff may reply such subsequent demand and refusal by the defendant, which if proved, plaintiff must have a verdict. If upon a tender pleaded, the plaintiff will not receive the money, but take issue upon the tender, and it is found against him, the money is lost for ever. *Co. Lit.* 207. *Hob.* 199. *Ld. Ray.* 642.

If plaintiff takes money out of court,

If the plaintiff takes the money out, he may proceed for further damages by joining issue on the general issue pleaded, confessing the tender in his replication.

Tender by justices.

Tender of amends may be made by justices of the peace, within a month after notice given of an action intended to be brought against them, for any thing done by them *in the execution of their office*, and they may plead the same with *Not Guilty*, and any other plea, with leave of the court; and in case they shall neglect to make such tender, they may, before issue joined, pay money into court. 24 *Geo. 2. c. 44. s. 24.*

Trespass.

The defendant may, to a trespass *quare clausum fregit*, plead a disclaimer, and that the trespass was by negligence, or involuntary, and tender of sufficient amends before action brought; whereupon, or on some of them, the plaintiff shall be enforced to join issue. *Stat. 21 Jac. 1. c. 16.*

Tender

Tender may be made before action, for any unlawful act done by a person who has distrained for rent justly due, 11 *Geo. 2. c. 19. s. 20.*; likewise in distraining for money justly due for the relief of the poor. 17 *Geo. 2. c. 38. s. 10.*

A tender in any money coined at the *Mint*, upon which there is the king's stamp, is good; for all such money is good in proportion to its value, without a proclamation. *Salk. 446. Comb. 387.*

To an avowry for damage feasant in replevin, tender must be pleaded to have been made before impounding; for it is not within the *statute of Jac. 1.* which goes only to trespass, where tender of amends may be pleaded to have been made at any time before action brought. *Lutw. 1596.*

To an avowry for rent, the plaintiff may plead a tender and refusal, without bringing the money into court, because if the distress were not rightfully taken, the defendant must answer the plaintiff his damages. *Bull. 60. Salk. 584.*

But if the distress were rightfully taken, the plaintiff cannot plead tender of rent and costs in bar of an avowry for rent in any case, unless the distress was made of corn, grass, &c. growing on the premises; and then such plea is given by 11 *Geo. 2. c. 19. s. 9.*

If a tender be pleaded with a *toutjour priſt*, and the money brought into court, in case the plaintiff would go for further damages, he must not take the money out of court, but take issue on the tender, or reply a *request* and *refusal*; and if such issue is found against him, he will be barred of his action: but if he take the money out of court, judgment is given for the defendant to go quit. *Ld. Ray. 774. Cliff v. Jones.*

The money cannot be taken out by the defendant, though he has a verdict. *Str. 1027. Cox v. Robinson.*

On a plea of tender with a *proſert in curia*, of the money, if the money be not paid into court, the plaintiff may sign judgment. *Str. 638. Pether v. Shelton.*

Under distress for rent.

Any money coined at the Mint good.

To an avowry for damage feasant when tender to be made.

In a plea in bar of tender of rent in replevin, the money ought not to be brought into court.

If the money be not paid into court.

Shelton. The money is paid to Messrs. *Provost* and *Webb*, who give a receipt for the same in the margin of the plea, which is to be signed by counsel, and filed with the clerk of the papers.

Costs.

If there is a plea of tender as to part, and *non assumpsit* as to the residue, and the issue on the tender being found for the defendant, the balance proved is under 40s. yet the defendant, though within the jurisdiction of the county court of *Middlesex*, is not entitled to costs under 23 *Geo. 2. c. 33. s. 19.* Nor if the debt is reduced under 40s. by a set-off. *Doug. 448, 449. Heaward v. Hopkins.*

Bank notes.

Buller J. This court has never yet determined that a tender of *bank notes* is at all events a good tender; but if they have been offered, and no objection has been made on that account, this court has considered it as a good tender; and very properly so; for bank notes pass in the world as cash. In this court we have always been inclined to consider *them as money*, though the question has never yet been directly determined. *Wright v. Reed. 3 Term Rep. 554. Lord Mansfield.*

Bank notes
treated as money
here and abroad.

A bank note is constantly and universally, both at home and abroad, treated as *money*, as cash, and paid and received as *cash*, and it is necessary for the purposes of commerce that their *currency* should be *established* and *secured.* *Miller v. Race. 1 Burr. 459.* They are treated as money in the ordinary course and transaction of business, by the general consent of all mankind; which gives them the credit and currency of *money*, to all intents and purposes: They are as much money as guineas themselves are; or any other current coin, that is used in common payments as money or cash. They pass by a will which bequeaths money or cash, and are never considered as *security* for money, but as *money itself.* On payment of them, the receipts are always given for *money*, not as *securities* or *notes.* *Ibid.* A tender of a bank note as money, is not, *strictly* speaking, a good tender; but if the tenderer offer to get the money for the note, this makes it a good tender. 2 *Eq. Cas. Abr. 319.*

pleas

Pleas in Abatement.

AND the said *Mary* in her own proper person comes and says, that she now is, and before and at the time of exhibiting the bill of the said *John*, was, and ever since hath been, covert and married to one *William Morris* then and still her husband, and living, to wit, at *London* aforesaid, in the parish and ward aforesaid, and this the said *Mary* is ready to verify; wherefore because the said *William Morris* is not named in the said bill, the said *Mary* prays judgment thereof, and that the same may be quashed, &c.

Coverture pleaded in abatement to an action by bill.

J. M.

And he against whom the said *James* hath issued his original writ, by the name of *Thomas Stout*, in his proper person comes and pleads that he was baptized by the name of *John*, to wit, at *Westminster* aforesaid, and by the christian name of *John*, hath always since his baptism hitherto been called and known; without this, that the said *John* now is, or at the time of suing forth the said original writ of the said *James*, or ever before was, or at any time since hath been called or known by the christian name of *Thomas*, as by the said writ is above supposed; and this he the said *John* is ready to verify: wherefore he prays judgment of the said writ, and that the same may be quashed, &c.

Misnomer pleaded in the christian name to an action by original.

J. M.

The defendant is to file this plea and affidavit annexed, with the clerk of the papers.

James Letch, plaintiff,

and

In the King's Bench.

John Stout, sued by the name of
Thomas Stout, defendant.

John Stout, of, &c. mealman, the defendant in this cause, maketh oath and saith, That the plea hereto annexed is true in substance, and matter of fact.

Affidavit to be annexed to plea.

Sworn, &c.

John Stout.

To

To be sworn before a judge, and ingrossed on a treble sixpenny stamp paper.

Replication to a plea of misnomer in the surname, that defendant is known as well by one name as the other.

And the said *James* says, That notwithstanding any thing by the said *John* above in pleading alleged, the said bill ought not to be quashed, because he says, that the said *John*, at the time of exhibiting the bill of the said *James*, and before, was called and known as well by the name of *Hody* as by the name of *Oddy*, as by the said bill is above supposed; and this he prays may be inquired of by the country, &c.

J. M.

Partnership pleaded in abatement.

And the said *John* in his own person comes and defends the wrong and injury, when, &c. and says, That the supposed promises and undertakings in the said declaration mentioned, if any such were made, were and each of them was made, by the said *John Mead* and *John Wilson*, *Charles Roberts*, and *Michael Tew*, jointly, and not by the said *John Mead* only, which said *John Wilson*, *Charles Roberts*, and *Michael Tew*, are still alive; to wit, the said *John Wilson*, in the island of _____, the said *Charles Roberts*, late at *Liverpool*, in the county of *Lancaster*, but now on a voyage at sea, and the said *Michael Tew*, in *Liverpool* aforesaid; and this the said *John Mead* is ready to verify; wherefore, because the said *John Wilson*, *Charles Roberts*, and *Michael Tew* are not named in the said bill, the said *John Mead* prays judgment thereof, and that the same may be quashed, &c.

W. B.

If a plea in abatement is to be pleaded in an action brought by original. *Vide my New Inst. Cler. in C. P. for precedents. 3d Ed. 289.*

General Issues.

General issues.

THE general issue, or general plea, is what traverses, thwarts, and denies at once the whole declaration, without offering any special matter whereby to evade it; as in trespass, either vi

et armis, or on the case, *non culpabilis*, not guilty; in debt upon contract, *nil debet*, he owes nothing; in debt on bond, *non est factum*, it is not his deed, or on an *assumpsit*, *non assumpsit*, he made no such promise; or in a real action, *nul tort*, no wrong done; *nul disseisin*, no disseisin; and in a writ of right, the mise or issue is, that the tenant has more right to hold, than the demandant has to demand. These pleas are called the general issue, because by importing an absolute and general denial of what is alledged in the declaration, they amount at once to an issue, by which is meant, a fact affirmed on one side, and denied on the other.

No general issue need be signed by counsel, but it is to be ingrossed on a treble penny stampd paper, and delivered to the attorney for the plaintiff, or may be entered in the book kept by the clerk of the judgments, pay 6d.

And the said *John*, by *R. C.* his attorney, comes *Non assumpsit*. and defends the wrong and injury, when, &c. and says, that he did not undertake or promise, in manner and form as the said *A. B.* hath above thereof complained against him, and of this he puts himself upon the country, &c.

And the said *John*, by *R. C.* his attorney, *Non est factum*. comes and defends the wrong and injury, when, &c. and says, that the said writing obligatory (or indenture) in the said declaration mentioned, is not his deed; and of this he puts himself upon the country, &c.

And says, that he does not owe to the said *Richard* the said sum of 100*l.* above demanded, or any part thereof, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c.

That he doth not owe to our said lord the king, and to the said *Richard*, who sues as aforesaid, the said sum of 100*l.* above demanded, or any part thereof, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c.

Same to a *qui tam* action.
Cur.

Cur. Not guilty to an action of debt on 10 *Ann.* c. 16. is not a nullity; and indeed it should rather seem that this is a good plea; for as this is an action for an offence under a penal statute, the defendant by such a plea, says that he is not guilty of the offence. Upon a devastavit against executors, not guilty may be pleaded as well as *nil debet*. *Coppin qui tam v. Carter. Term Rep. 1 V. 462.*

*Non assumpsit
testatoris.*

That the said *A. B.* in his life-time did not undertake or promise, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c.

Non detinet.

That he doth not detain from the said *Richard* the said indenture of lease, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c.

Not guilty in
trespass.

That he is not guilty of the supposed trespass above laid to his charge, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c.

Not guilty in
trespass and
assault.

That he is not guilty of the supposed trespass and assault above laid to his charge, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c.

Not guilty in
case.

That he is not guilty of the premises above laid to his charge, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c.

*Non assumpsit
and notice of
set-off.*

To be ingrossed
on a treble rd.
paper, and need
not be signed by
counsel.

And the said *John*, by *J. S.* his attorney, comes and defends the wrong and injury, when, &c. and says, that he did not promise or undertake, in manner and form as the said *Benjamin* hath above thereof complained against him; and of this he puts himself upon the country, &c.

Benjamin Philpot, Plaintiff,
and

John Shears, Defendant.

In the King's Bench.

Notice of set-off
for work and
labour with
horses, &c.

Take notice that the above defendant will at the trial of this cause give in evidence, and insist, that

that the plaintiff before and at the time of the commencement of this suit, was, and still is, indebted unto the said defendant in the sum of 200*l.* for the use and hire of divers horses, mares, and geldings, by him the said defendant, before then let to hire to the said plaintiff, and at his request; and for the carriage of divers goods, wares, and merchandizes, before then carried by and in divers waggons, carts, and other carriages of the said defendant, for the said plaintiff, and at his like request; and for work and labour before then done and performed by the said defendant and his servants, and with his horses, carts, waggons, and other carriages for the said plaintiff, and at his like request; and also for money before then paid, laid out, and expended by the defendant for the said plaintiff, and at his like request; and for money by the said defendant before then lent and advanced to the said plaintiff, and at his like request; and for money by the said plaintiff before then had and received to and for the use of the said defendant, and for divers goods, wares, and merchandizes, by the said defendant before then sold and delivered to the said plaintiff, and at his like request; and for money due and owing from the said plaintiff to the said defendant upon an account stated between them; which said sum of 200*l.* is still due and owing from the said plaintiff to the said defendant, and out of which said sum of money, he the said defendant will, at the trial of this cause, set off and allow to the said plaintiff so much thereof against any demand of the said plaintiff, to be proved at the said trial, as will be sufficient to satisfy and discharge such demand, pursuant to the statute in such case made and provided. Dated the 11th day of November 1791.

To be delivered to the plaintiff's attorney, and if necessary to be proved at the trial, to be produced ingrossed on a treble 1*d.* stamp-paper.

Yours, &c.

To Mr. A. B. Plaintiff's Attorney.

J. S. Defendant's Attorney.

T

In

In the King's Bench.

Edward Willis, Plaintiff,

Between and

Leonard Hill, Defendant.

Notice of set-off
for money due
on a judgment in
the K. B.

N. B. Put the
non assumpsit first.

Take notice, That the above defendant will, at the trial of this cause, give in evidence and insist, that he the said defendant heretofore, to wit, in this present *Trinity* term, in the thirty-first year of the reign of our lord the now king, in the court of our said lord the king, before the king himself (the said court then and still being holden at *Westminster*, in the county of *Middlesex*) by bill, without the writ of our said lord the king, and by the consideration and judgment of the same court, recovered against the above-named plaintiff 4*l.* 10*s.* which, in and by the said court, were then and there adjudged to the said defendant, for his damages which he had sustained, as well by reason of the not performing certain promises and undertakings then lately made by the said plaintiff, to the said defendant, and whereof he the said plaintiff was convicted, as for his costs and charges by him about his suit in that behalf expended, as by the record and proceedings thereof, remaining in the said court of our said lord the king, before the king himself, to wit, at *Westminster* aforesaid, more fully appears; which said judgment is still in full force and effect, not reversed, satisfied, or otherwise vacated; and that under and by virtue of the said judgment, he the said plaintiff, before and at the time of the commencement of this suit, was, and still is, indebted to the said defendant in a large sum of money, to wit, in the said sum of 4*l.* 10*s.*; and out of which said sum of money he the said defendant will at the said trial, set off and allow to the said plaintiff, so much thereof against any demand of him the said plaintiff, to be proved at the said trial, as will be sufficient to satisfy and discharge such demand, according to the form of the statute in such case made and provided. Dated, &c.

Yours, &c.

Special

Special Pleas.

AND the said *John*, by *J. B.* his attorney, comes and defends the wrong and injury, when, &c. and says, That he did not undertake and promise, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c. And for further plea in this behalf, the said *John*, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said *Richard* ought not to have or maintain his aforesaid action thereof against him, because he saith, that he did not undertake or promise, at any time within six years next before the day of exhibiting the bill of the said *Richard* in manner and form as the said *Richard* hath above thereof complained against him; and this the said *John* is ready to verify; wherefore he prays judgment, if the said *Richard* ought to have or maintain his aforesaid action thereof against him, &c.

Plea of
non assumpsit,
and the statute
of limitations.

To be ingrossed
on treble penny,
and filed with
the clerk of the
papers.

J. M.

And the said *Richard*, as to the said plea of the Replication, said *John*, by him secondly above pleaded in bar, says, that he by reason of any thing by the said *John* in that plea above alledged, ought not to be barred from having or maintaining his aforesaid action thereof against him, because he says, that the said *John* did, within six years next before the day of exhibiting the bill of him the said *Richard*, to wit, on the _____ day of _____ in the year of our Lord

1791, at *Westminster* aforesaid, undertake and promise, in manner and form as the said *Richard* hath above thereof complained against him; and this he prays may be inquired of by the country. And the said *John* doth the like. Therefore, as well to try this issue, as the said other issue above joined, let jury thereupon come before our lord the king at

N. B. This replication the clerk of the papers draws, and there needs no counsel's hand.

Plea of set-off
for money lent,
laid out, and
had and re-
ceived,

Westminster, on, &c. by whom, &c. and who nei-
ther, &c. to recognize, &c. because as well, &c.

And the said *John*, by *R. P.* his attorney, comes and defends the wrong and injury, when, &c. and says that the said *Richard* ought not to have his aforesaid action thereof maintained against him, because he says, that the said *Richard*, before and at the time of the exhibiting the bill of the said *Richard* against the said *John*, that is to say, on the 1st day of *June*, in the year of our Lord 1791, at *Westminster* aforesaid, in the county aforesaid, was and still is indebted to the said *John* in a large sum of money, (that is to say) in the sum of 100*l.* of lawful money of *Great Britain*, for so much money by the said *John* before then lent and advanced to the said *Richard*, and at his special instance and request; and in the further sum of 100*l.* of like lawful money, for money before that time paid, laid out, and expended by the said *John*, to and for the use of the said *Richard*, and at his like instance and request; and in the further sum of 100*l.* of like lawful money, for money by the said *Richard* before that time had and received, to and for the use of the said *John*. And the said *John* further says, that the said several sums of money so due and owing from the said *Richard*, to the said *John*, as aforesaid, exceed the damages sustained by the said *Richard*, by reason of the not performing the said several promises and undertakings of the said *John*, in the said declaration mentioned; and that out of which said several sums of money, he the said *John* is willing, and hereby offers to set off and allow to the said *Richard* the full amount of the said damages, according to the form of the statute, &c.; and this the said *John* is ready to verify: Wherefore he prays judgment, if the said *Richard* ought to have his aforesaid action thereof maintained against him, &c. J. M.

Replication
thereto.

And the said *Richard* says, That he, by reason of any thing by the said *John* above in pleading alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him, because

because he says, that he the said *Richard* was not, nor is indebted to the said *John* in manner and form as the said *John* hath in his said plea in that behalf above alledged; and this he the said *Richard* prays may be inquired of by the country; and the said *John* doth the like, &c. Therefore let a jury thereupon come, &c.

And the said *John*, by S. U. his attorney, comes and defends the wrong and injury, when, &c. and says, that the said *Richard* ought not to have or maintain his aforesaid action thereof against him, because he says, that after the making of the several promises and undertakings in the said declaration mentioned, to wit, on the first day of *May*, in the year of our Lord 1784, at *London* aforesaid, in the parish and ward aforesaid, the said *John* delivered to the said *Richard* one hogshead of sugar, in full satisfaction and discharge of the said several promises and undertakings in the said declaration mentioned, and of all damages and sums of money thereupon due, owing, or accrued; and which said hogshead of sugar the said *Richard* then and there accepted and received of and from the said *John* in full satisfaction and discharge of the said several promises and undertakings in the said declaration mentioned, and of all damages and sums of money as aforesaid; and this he the said *John* is ready to verify; wherefore he prays judgment, if the said *Richard* ought to have or maintain his aforesaid action thereof against him, &c.

Plea of satisfaction in assumption.

J. M.

And the said *Richard* says, That he, by reason of any thing by the said *John* in his aforesaid plea above alledged, ought not to be barred from having and maintaining his aforesaid action thereof against him, because protesting that the said *John* did not deliver to him the said *Richard* the said hogshead of sugar in the said plea mentioned, in full satisfaction or discharge of the said several promises and undertakings in the said declaration mentioned, or of any or either of them, or of all or any part of the damages or sums of money thereupon due, owing, or accrued,

Replication thereto.

accrued, in manner and form as the said *John* hath above in his said plea in that behalf alledged; for replication in this behalf, the said *Richard* says, that he did not accept or receive the said hogthead of sugar of or from the said *John*, in full satisfaction or discharge of the said several promises and undertakings in the said declaration mentioned, or of any or either of them, or of all or any part of such damages or sums of money as aforesaid, in manner and form as the said *Richard* hath above in his said plea in that behalf alledged; and this he the said *Richard* prays may be inquired of by the country; and the said *John* doth the like, &c. Therefore, &c.

Non assumps. to
part, and a ten-
der to the resi-
due.

And the said *T.* by *A. B.* his attorney, comes and defends the wrong and injury, when, &c.; and as to the said several promises and undertakings in the said declaration mentioned, except as to 4*l.* and 4*s.* parcel of the said several sums of money in the said declaration also mentioned, says, that he did not undertake and promise, in manner and form as the said *J.* hath above thereof complained against him, and of this he puts himself upon the country. And as to 4*l.* and 4*s.* parcel of the said several sums of money in the said declaration mentioned, the said *T.* says, That the said *J.* ought not to have or maintain his aforesaid action in this behalf against him the said *T.* to recover any more or greater damages than the said 4*l.* and 4*s.* in this behalf, because he says, That he the said *T.* always from the time of making the said several promises and undertakings in the said declaration mentioned as to the said 4*l.* and 4*s.* always hitherto was, and still is, ready to pay to the said *J.* the said sum of 4*l.* and 4*s.* and that he the said *T.* before the exhibiting of the bill of the said *J.* to wit, on the 22d day of *April*, in the said year of our Lord 1784, at, &c. in the said county, tendered and offered to pay to the said *J.* the said 4*l.* and 4*s.*; which said 4*l.* and 4*s.* the said *J.* then and there wholly refused to receive from the said *T.*; and the said *T.* now brings the said 4*l.* and 4*s.* here into court, ready to be paid

The day may be
stated under a
scilicet.

paid to the said *J.* if he the said *J.* will accept the same; and this he is ready to verify; wherefore he prays judgment, if the said *J.* ought to have or maintain his aforesaid action thereof against him, to recover any more or greater damages than the said 4*l.* 4*s.* in this behalf, &c.

J. M.

And the said *J.* as to the said plea of the said *T.* by him above pleaded, as to the said 4*l.* and 4*s.* parcel of the said several sums of money in the said declaration mentioned, says, That he, by reason of any thing by the said *T.* in that plea above alledged, ought not to be barred from having and maintaining his aforesaid action thereof against him to recover his full damages in this behalf; because he says, that the said *T.* did not tender or offer to pay to the said *J.* the said 4*l.* and 4*s.* in manner and form as the said *T.* hath above in pleading alledged; and this he prays may be inquired of by the country, and the said *T.* doth the like. Therefore, &c.

Replication denying the tender.

Join issue as to the non assumpsit, and at the end of the plea of tender, say: And hereupon the said plaintiff freely takes and accepts out of court here the said 4*l.* and 4*s.* so tendered and paid into court as aforesaid; therefore, as to the said 4*l.* and 4*s.* the said plaintiff is satisfied; and as to the trial of the issue above joined between the parties aforesaid, let a jury thereupon come before our lord the king at Westminster, on next after

If the plaintiff accepts the money, and goes for further damages.

by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. the same day is given to the parties aforesaid, at the same place.

N. B. This issue is made up by the clerk of the papers.

Because he says, that he the said defendant, at the time of the making the said several promises and undertakings in the said declaration mentioned, was under the age of 21 years, to wit, of the age of 18 years, and no more, to wit, at London aforesaid, &c. and this he is ready to verify; wherefore, &c.

B. L.

And

Plea of judgment recovered in C. P. in assumpsit.

And the said Roger, by J. S. his attorney, comes and defends the wrong and injury, when, &c. and says, that the said C. ought not to have or maintain his aforesaid action thereof against him, because, he says, that heretofore, to wit, in Trinity term, in the 31st year of the reign of his present majesty, the said C. impleaded the said Roger, in his said majesty's court, before Alexander lord Loughborough, and his companions, then his majesty's justices of the bench at Westminster, in the county of Middlesex, in a certain plea of trespass on the case, on promises, to the damage of the said C. of 60*l.* on occasion of the not performing the very same identical promises and undertakings in the said declaration mentioned, and such proceedings were thereupon had in the said court of the bench aforesaid in that plea; that afterwards, to wit, in that very same Trinity term, in the 31st year aforesaid, the said C. by the consideration and judgment of the said court, recovered against the said R. in that plea 60*l.* for his damages which he had sustained, on occasion of the not performing the very same identical promises and undertakings in the said declaration mentioned, and whereof the said Roger was convicted, as by the record, and proceedings thereof, remaining in the said court of the bench aforesaid, at Westminster aforesaid, more fully appears; which said judgment still remains in its full force, strength and effect, not in the least reversed, set aside, paid off, annulled, satisfied or discharged; and this he is ready to verify by the said record; wherefore he prays judgment, if the said C. ought to have or maintain his aforesaid action thereof against him, &c.

J. Morgan.

The like plea of a judgment recovered in debt.

And the said J. and W. by I. T. their attorney, come and defend the wrong and injury, when, &c. and say, that the said W. ought not to have his aforesaid action thereof maintained against them, because they say, that the said W. heretofore, to wit, in term, in the year of the reign of his present majesty, impleaded the said J. and W. in

W. in his majesty's court before *Alexander* lord *Loughborough* and his companions, then his majesty's justices of the bench, at *Westminster*, in the county of *Middlesex*, in a certain plea of debt, for 800*l.* of and upon the said identical writing obligatory in the said declaration mentioned; and such proceedings were thereon had, in the said court of the bench aforesaid, in that plea; that the said *W.* afterwards, to wit, in that same term, in the year aforesaid, by the consideration and judgment of that court, recovered in the said plea, against the said *J.* and *W.* his debt aforesaid, and also 5*l.* which in the said court of the bench aforesaid, were adjudged to him, for his damages which he had sustained, on occasion of the detaining of the said debt, whereof the said *J.* and *W.* were convicted, as by the record, and proceedings thereof, still remaining in the said court of the bench aforesaid, at *Westminster* aforesaid, more fully appears, which said judgment still remains in its full force, strength, and effect, not in the least reversed, set aside, paid off, satisfied or discharged; and this they the said *J.* and *W.* are ready to verify, by the said record; wherefore they pray judgment, if the said *W.* ought to have his aforesaid action thereof maintained against them, &c.

J. Morgan.

And the said *James*, by *J. M.* his attorney, Plea of non assumpsit and plena administravit. comes and defends the wrong and injury, when, &c. and says, That the said *B. C.* in his lifetime did not undertake or promise, in manner and form as the said *John* hath above thereof complained against him; and of this he puts himself upon the country, &c. And for further plea in this behalf, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, the said *James* says, that the said *John* ought not to have or maintain his aforesaid action thereof against him, because he says, that he hath fully administered all and singular the goods and chattels, which were of the said *B. C.* deceased, at the time of his death, and which have ever come to

or

or been in his hands to be administered, to wit, at *London* aforesaid, &c.; and that he the said *James* hath not, nor, on the day of exhibiting the bill of the said *John*, or at any time since, had any goods or chattels which were of the said *B.* at the time of his death, in the hands of him the said *James* to be administered; and this he the said *James* is ready to verify; wherefore he prays judgment if the said *John* ought to have or maintain his aforesaid action thereof against him, &c.

H. Russel.

Plea of *plene administravit*, and a judgment outstanding.

Non assumpsit. And for further plea, in this behalf the said *S.* (as in the former plea) by leave of the court, &c. says, that she the said *S.* hath fully administered all and singular the goods and chattels, which were of the said *W.* at the time of his death, and which have ever come to or been in her hands to be administered, to wit, at *London* aforesaid, &c. and that she the said *S.* hath not, nor on the day of exhibiting the bill of the said *T.* or at any time since, had any goods or chattels, which were of the said *W.* at the time of his death, in her hands to be administered; and this she is ready to verify; wherefore, &c. And for further plea in this behalf, the said *S.* by like leave of the court here for this purpose first had and obtained, according to the form of the statute in that case made and provided, says, that the said *T.* ought not to have or maintain his aforesaid action thereof against her, because she says that one *B. B.* heretofore (that is to say) in *Michaelmas* term, in the twentieth year of the reign of our lord the now king, in the court of our lord the king, before the king himself, the said court then and still being held at *Westminster* in the said county, by the consideration and judgment of the said court, recovered against the said *S.* as well a certain debt of 100*l.* as also 63*s.* for his damages which he had sustained, as well by reason of the detaining of the said debt, as for his costs and charges by him about his suit in that behalf expended, to be levied of the goods and chattels which were of the said *W.* at the time of his death, in her hands to be administered,

if

Says
tain his
he says
said seve
claration
bill of t
in the ye
&c. beca
ing of
and that
said decl

if she had so much thereof in her hands to be administered, and if she had not so much thereof in her hands to be administered, then the damages aforesaid to be levied of the proper goods and chattels of the said *S.* whereof the said *S.* was convicted, as by the record, and proceedings thereof, remaining in the said court of our said lord the king, before the king himself, at *Westminster* aforesaid, more fully appears; which said judgment still remains in its full force and effect, not paid off, satisfied, discharged, or made void; and which said judgment, so had and obtained, was so had and obtained for a true and just debt of fifty pounds, due and owing to the said *B.* from the said *W.* at the time of his death: And the said *S.* further says, that she hath fully administered all and singular the goods and chattels which were of the said *W.* at the time of his death, and which have ever come to or been in her hands to be administered (except goods and chattels to the value of 5*s.*), to wit, at *London* aforesaid, in, &c. and that the said *S.* hath not, nor at the time of exhibiting the bill of the said *T.* or at any time since, had any goods or chattels, which were of the said *W.* at the time of his death, in the hands of her the said *S.* to be administered (except the said goods and chattels to the value of 5*s.*), which are not sufficient to pay and satisfy the money due and owing upon the said judgment, in form aforesaid recovered against the said *S.* as administratrix as aforesaid, and which are liable to the payment and satisfaction thereof; and this she is ready to verify; wherefore, &c.

W. Baldwin.

Says that the said *A.* ought not to have or maintain his aforesaid action thereof against him, because he says that he the said *C.* after the making of the said several promises and undertakings in the said declaration mentioned, and before the exhibiting the bill of the said *A.* to wit, on the first day of *August*, in the year of our Lord 1784, at *London* aforesaid, &c. became a bankrupt within the intent and meaning of the several statutes concerning bankrupts; and that the several causes of action aforesaid, in the said declaration mentioned, accrued, and each and every

Plea of bankruptcy in the defendant.

every of them, did accrue to the said *A. B.* before such time as he the said *C.* so became a bankrupt, to wit, at *London* aforesaid, &c. and of this he puts himself upon the country, &c. *J. M.*

By *stat. 5 Geo. 2. c. 30. s. 7.* The bankrupt may plead this plea generally; and it must conclude to the country. *Vide 1 Peere W. 249. 10 Mod. 160.*

Plea nullius record to an action on a judgment.

And the said *James*, by *Thomas Medley*, his attorney, comes and defends the wrong, and injury, when, &c. and says, that the said *Joel* ought not to have or maintain his aforesaid action thereof against him, because he says, that there is not any such record of the recovery against him the said *James*, at the suit of the said *Joel*, remaining in the said court of our said lord the king, before the king himself, in manner and form as the said *Joel* hath above in that behalf alledged against him the said *James*; and this he is ready to verify; wherefore he prays judgment, if the said *Joel* ought to have or maintain his aforesaid action thereof against him, &c.

Replication.

And the said *Joel* says, That he, by reason of any thing by the said *James*, in his said plea above alledged, ought not to be barred from having or maintaining his aforesaid action thereof against him the said *James*, because he says that there is such a record of the recovery against him the said *James* at the suit of the said *Joel* remaining in the said court of our said lord the king, before the king himself, as the said *Joel* hath above in that behalf alledged; and this he the said *Joel* is ready to verify by the said record, and prays that the same may be inspected, &c.; and because the said *Joel* hath not the said record here ready to be produced, day is given to the said *Joel*, before our lord the king at *Westminster*, until — next after — to have the same ready to be produced; the same day is given to the said *James*, &c.

Must give term and number-roll, if demanded.

If a judgment or matter of record of the same court be pleaded, the party pleading the same must on demand give a note in writing of the term and number-roll whereon such judgment or matter of record

record is entered and filed, or in default thereof the plea is not to be received. *N. on R. Trin. 5 and 6 Geo. 2.*

Of moving to abide by Plea.

IF the defendant plead a special plea, as a judgment recovered in another court for the same cause, or such a plea as you think he will not abide by, you may move the court for him to stand by such plea, or plead such other *instantly* as he will stand by, which is done by *motion in court*; if to plead on the morrow, that may be done by a counsel's hand being signed; take the latter to the clerk of the rules, (the former is handed up in court), in either case he draws up the rule, pay him 5s. counsel 10s. 6d. make copy, and leave it with defendant's attorney, or at his house.

A judge at his chamber, in *vacation time*, may make an order, that the defendant shall plead such a plea as he will stand by. *2 Burr. 781. Foster v. Shaw.*

By not pleading anew within the time allowed, of course the defendant then abides or stands by his former plea, therefore proceed to make up the paper book.

If it be towards the *end of the term* (that the plaintiff may have sufficient time to give notice of trial), the court will order the defendant, if he will not abide by his plea to plead another *instantly*, provided always that the time allowed by the common rule to plead be expired; and the practice is the same with regard to frivolous demurrers. *N. on Rule T. 5 & 6 Geo. 2.*

In case of a dilatory plea or frivolous demurrer, the court will order defendant to stand by it, or plead *instantly*.

If a plea has been pleaded, and the plaintiff obtains a rule or order of a judge, that he plead such other as the defendant will abide by, the defendant may either stand by the plea pleaded, or plead such other within the time limited by such rule or order, but he can only plead the general issue and a set-off after such rule or order. *Hare v. Lloyd. Term Rep. 1 V. 693.*

If he plead a new plea, it can only be the general issue and a set-off.

The

The costs I believe of this motion are allowed, whether the defendant plead a-new or not.

Of striking out Special Plea.

When the paper book is delivered to defendant's attorney, he may, unless the rule for abiding by his plea be obtained previous, within the time limited by the rule for the return, strike out the special plea, and plead the general issue; or, if the defendant demur specially, and the book be made up, he may, within the time, strike that out, and plead the general issue.

Cannot waive the general issue or general demurrer. But if special he may.

The defendant cannot *waive* the general issue, and instead thereof give a *special plea* or *demurrer*, but he cannot *waive* a *general demurrer*, and give a *special demurrer*, or *special plea*. *N. on R. T. 5 & 6 Geo. 2.* But if a *special plea* or *special demurrer* be given in, and the book is made up, and delivered to the defendant's attorney, he may strike out the *special plea* or *demurrer*, and return it with the *general issue*, or *general demurrer*. *Ibid.* And though he is tied down by a rule of court, or an order to plead *issuably*, and take short notice of trial, and the plaintiff replies, yet he may demur to the replication, if there is *good cause* without breach of the rule or order, but not otherwise. *Sir. 1185. Dewey v. Sopp.*

And may demur to the replication.

Replication.

How to compel Plaintiff to reply, &c.

No time fixed for replying, &c.

THERE is no time fixed upon for replying to the plea, &c. the party who is to do the act applies to the master for a special rule for that purpose on the part of the defendant, and if the plaintiff does not file his replication, &c. within the time limited, which is *four days exclusive after the service of the rule*, judgment may be signed *without a demand made of such replication, &c.* as the *service of the rule* is deemed a demand of itself.

Sunday,

Sunday, or any *holiday* on which the court does *Sunday*, &c. not sit, if it be not *the last of those four days*, is to be reckoned a day within those rules.

To compel the party to *reply*, &c. get a rule To compel from the master entered at the back of your last proceedings, *viz. plea, replication, &c.* take same to the clerk of the rules, whose clerk *enters it*; pay 1s. 10d. then serve copy on plaintiff's attorney, naming the cause, thus: "*Doe v. Roe, Saturday next after, &c. to reply, entered,*" If the replication, &c. is not filed or delivered, as the case happens (if special, at the clerk of the papers, if to a general plea, to the attorney), then when rule is expired, *sign judgment of nonpros*; for which see *title Nonpros.*

If a cause hath continued *four terms* without prosecution before issue joined, each party shall have a term's notice to reply, rejoin, &c. unless the cause hath been staid by injunction or privilege; and that such notice must be given before the *essoign day*.

I take it the notice should be, *that you intend to proceed by giving a rule to reply, &c.* and that the rule is to be given by the master the *day after the last day of the term*, as the notice must be delivered before the *essoign day of the preceding term*, it is to be entered with the clerk of the rules before service.

Rule to reply, rejoin, &c. may be given at any time in term time, or within *sixteen days* after the term.

A replication was, by leave of the court, withdrawn six terms after filed. 2 Burr. 756. *Alder v. Chip.*

If you want time to reply, &c. you may have a summons for that purpose.

Proceed in the same way to urge defendant to rejoin, rejoin, plaintiff to surrejoin, and so on, until issue be joined.

Paper Books.

Definition.

PAPER Books are the issues in law upon special pleadings, made up by the clerk of the papers, who is an officer appointed by the court for that purpose. And such clerk, in all copies of pleas and paper books by him made up, shall subscribe to such paper books *the names of the counsel* who have signed such plea, as well on the behalf of the plaintiff, as of the defendant; and that in all books to be delivered to the justices of this court, the names of the *counsel* who shall sign those pleadings, as well on the part of the plaintiff, as on the part of the defendant, shall be written under those books by the clerks or attorneys who shall deliver those books. *R. E. 18 C. 2.*

In what cases the attornies may make up the issue, *vide* title Issue.

Paper days.

Tuesdays and *Fridays* are called special paper days, because the court goes into the paper, before they enter upon motions.

In what cases paper book may be made up, without giving a rule to rejoin.

In all special pleadings where the plaintiff takes issue upon the defendant's pleading, or traverseth the same, or demurs, so as the defendant is not let in to alledge any new matter, there the plaintiff may make up the paper book without giving a rule with the secondary to rejoin, otherwise a rule must be given. *N. on Rule Trin. 1 Geo. 2.*

How to proceed to make up the Book.

How to make up paper book, if the action be in case.

If a special plea be left in the office, that is, such a one as plaintiff can take issue on, make a copy of your declaration on unstampt paper, and carry it to the clerk of the papers *Symond's Inn*, who will, if the replication be of course, draw same, and make up your paper book forthwith; and give this rule thereon, "Unless the defendant receives this paper book, and returns the same on (naming the day) to be enrolled,"

If i
viz. a
plea o
turns t
ings, g
" rule
rule, en
a copy
this dor
actly as
term, th
fendant,
it to the
mention

"let a writ be made," which is *four days*, exclusive of the day you deliver it; pay him *8d. per sheet* for the whole book, and *4d. per sheet* for all the pleadings subsequent to the declaration, besides stamps, which book keep a copy of, and deliver to defendant's attorney; if his plea concludes to the country, and the plaintiff joins issue thereon, you may give notice of trial on the back of the paper book, on the delivery. If the defendant's attorney does not return it in time, and pay for the pleadings on his part, sign judgment the same as if no plea had been delivered, and execute an inquiry; the same notice which was given for the trial shall serve for the inquiry; but give notice that such inquiry is to be executed on such a day, at such an hour and place; as for instance, "*at the sheriff's office, &c. between the hours of 10 and 12 in the forenoon.*" If he re-
 turn the paper book and pay you *8d. per sheet* for the pleadings on his part, viz. plea, rejoinder, &c. and *4d. per sheet* for the plaintiff's entries, viz. replication, &c. you then proceed to trial as in other cases. If defendant has not before paid for declaration, you cannot compel him to pay for it on return of the book.

Paying for the entries.

How to proceed on a Plea of Judgment recovered.

If it be not an issue on which you can go to trial, viz. an issue on a replication of *nul tiel record*, to a plea of a judgment recovered, and the defendant returns the book without striking out any of the pleadings, get the master to give on the paper book "*a rule to produce the record*," which is a four day rule, enter it with the clerk of the rules, pay *1s. 10d.* a copy of which is served on defendant's attorney; this done, enter all the proceedings on the roll exactly as they are in the paper book: first *entering the term*, then *warrants of attorney for plaintiff and defendant*, memorandum, &c. docket the same, carry it to the treasury chamber, and file it; on the day mentioned in the rule for defendant to produce the
 U record,

How to proceed on a plea of a judgment recovered.

record, go to *Westminster*, bespeak the roll at the treasury to be brought into court, and give paper book to one of the cryers, who will call defendant three times "*to produce the record or he will be condemned.*" Pay in the whole 4s. 6d. The secondary marks on the side of the roll "*the defendant hath not produced the record,*" which is signing the judgment, give notice of inquiry, and proceed to execution. But if it be in debt, a rule must be given for judgment, which expires in four days exclusive, sign judgment on a double half crown^a, bespeak the roll at Mr. *Way's* office in *Carey-street*, to be brought to the master's, he will tax the costs and mark them on the roll; then sue out execution.

^a The master will do this at *Westminster* for you in term.

How to proceed on the Return of the Book.

How to proceed if defendant returns the paper book, and demurs to the replication.

If defendant returns the paper book, and indorses thereon "*that he has struck out the rejoinder,*" (which he may do), and left a demurrer in the office, carry paper book to the clerk of the papers to have the demurrer and joinder added thereto; deliver the book again to the attorney (which is now called the demurrer book) and he must return the same in "*twenty-four hours,*" paying for the entries as before, or sign judgment, which is done as if no plea had been pleaded. But if he return the book in time, and pay for same, enter on the roll the term, warrants of attorney, and the memorandum as far as the cause of action; take it to the clerk of the judgments, he will enter it, then give a brief to counsel, with instructions to move for a *confilium*, (that is) a day appointed to argue the demurrer, which is signed only, pay 10s. 6d. take your roll to the clerk of the papers, who will mark it "*read,*" pay 1s. 6d. and he will sign his initials *R. H.* on counsel's brief; go to the clerk of the rules, give him the brief, and he will draw up the rule, pay him 4s. 6d. then return to the clerk of the papers, and he will set down the cause, pay 1s. The rule for the *confilium* need not be served unless when

On setting cause down for argument, the term and No. of the roll to be produced to the clerk of the papers, to shew you have made your entry at the judgment office,

Where defendant made up defendant's book with plaintiff's was given, that

it be for argument, but amongst fair practisers it is expected; make four copies of the demurrer books for the judges (no stamps), two of which are to be delivered by the plaintiff *two days before the day of argument*, viz. one to the *chief justice*, and the other to the *senior judge*; and if defendant has not left his, before eight in the evening (*two days before argument*) deliver the other two, to the two other judges (pursuant to the rule of *Mich. 17 Car. 1.*), pay the clerks each 2s. and in this case defendant is not to be heard; make one copy for counsel, and write thereon, "*to move for judgment*;" give him one guinea. On the day of argument attend the court, and pay the criers four shillings. In the evening go to the clerk of the rules, draw up the rule for judgment, pay 4s. and if the action be in case, take a treble penny stamp paper, enter thereon the memorandum, and carry it to the clerk of the judgments, who will sign judgment thereon, pay him 6d. then give notice of executing a writ of inquiry, and proceed therein as under title *Judgment by Default*.

How to proceed to argument on demurrer.

Plaintiff to deliver two books. Defendant to deliver two, or plaintiff may for him.

Draw up rule for judgment.

If the action be in debt, then stamp the rule with a double half crown, and proceed to tax the costs, first bespeak the roll from the treasury, *if carried in*, to be at the master's, if not, enter all the proceedings thereon yourself, and the master will mark the roll, pay 3s. 6d. then take out execution. No rule for judgment need be given after argument on demurrer in debt.

Special Notes respecting Paper Books.

Where the plaintiff, upon any pleading of the defendant, tenders an issue, and the paper book is made up and delivered with notice of trial, and the defendant strikes out the *similiter*, and returns the book with a demurrer, if judgment be given for the plaintiff on the demurrer, the same notice which was given for the trial of the issue on the paper book, shall serve for executing the writ of inquiry,

Where plaintiff tenders an issue on defendant's plea, and notice of trial given, if defendant demurs, and judgment given, it shall serve for inquiry.

but then the plaintiff ought to give notice of the hour, and place of executing the inquiry. *N. on R. H. 8 Geo. 1.*

A general demurrer cannot be waived, but a special one may. *N. on R. Trin. 5 & 6 Geo. 2. N. c.*

Notice of trial given for the special issue, shall (if waived) serve for notice of general issue.

Upon the delivery of any paper book, wherein an issue is joined, and notice of trial given on the back of the book, if the same be afterwards waived, and the general issue given, the notice which was given for the trial of the special issue, shall serve for notice of the general issue. *N. on Rule Hil. 8 Geo. 1.*

When to return the paper book if it be made up and delivered in term, or in four days after.

If a paper book be made up and delivered in term time, or *within four days exclusive after the term*, with a rule given thereon, by the clerk of the papers, for bringing the same book to be enrolled, and defendant's attorney doth not *within four days after the delivery thereof*, bring back the book, and join with the plaintiff in the special issue or demurrer made up, or waive his special plea, and give the general issue or demurrer to any special issue tendered, and pay for entering the pleadings on his part, judgment may be signed and entered, as if no plea had been pleaded. *N. on R. Trin. 1 Geo. 2.*

If a plea comes in late, how book is made up.

But where a plea is not put in in time, so that a paper book may be made and delivered *in term*, or *within four days after*; yet if it be made up and delivered *within eight days after the term*, defendant's attorney shall be obliged to take it, and return it again *in four days after the delivery*, or judgment may be signed. *Ibid.*

When to return book if not made up within eight days after term, and delivered.

If a plea be pleaded in term, or in time after the term, and the paper book is not made up and delivered *within eight days exclusive after term*, if it be an issue to be tried in *London or Middlesex*, or a demurrer, the other party is not bound to deliver back the book till *within the first four days of the next term*; but if it be an issue to be tried at the assizes, the defendant's attorney shall deliver it back within four days after delivery, and pay for entering his part, and join in the special issue or give the general

general issue, and take notice of trial, or else the plaintiff's attorney may sign judgment by default, as if the defendant had not pleaded. But in all cases, if the plaintiff's attorney accept the book after the limited time, he cannot sign judgment. *Ibid.*

The case of *Oxley v. Bridge* created much confusion in the practice, by the court's determining, that defendant had until the office opened to return the book although the rule expired the preceding evening, by which the defendant got the term of the plaintiff. *Dougl. 67.* But in *Trin. Term 1779*, it became the object of a second inquiry, and the case was this: Action on bond, plea judgment recovered. Replication, *nul tiel record*, the book was delivered with the usual *four day rule*. The book was not offered to be returned till the morning of the fifth day before the opening of the office, when the plaintiff refused to receive it, and immediately signed judgment, and took out execution. Rule to set the proceedings aside for irregularity. The master certified, that strictly the plaintiff was entitled to sign judgment, if the paper book was not returned on the evening of the fourth day, although it is a very common indulgence to allow him till the next morning. Lord Mansfield was clear, that a judgment entered up agreeably to what the master had certified to be, in *strictness*, the practice of the court, could not be set aside for irregularity. *Rule disch. Hofelar v. Ansell. Dougl. Rep. 197.*

The rule expired Saturday, paper book not returned till the Monday morning before the opening of the office, when plaintiff refused to receive it, and immediately signed judgment: Court held the judgment regular. *Thomson v. Ryal. 4 Term Rep. 195.*

If the defendant waive his plea and strike out the pleadings, and deliver the general issue, he, on return of the book, pays nothing for the entries. *Rule E. 30 Geo. 3.*

All special causes set down by the clerk of the papers to be argued, are to be entered at least *four days exclusive of the day of argument*, of which

On a rule to return the book within four days, if the defendant delay till the morning of the fifth day, the plaintiff may sign judgment.

Same doctrine.

When the pleadings are not to be paid for.

When to set down demurrer for argument.

notice is forthwith to be given to the attorney or agent on the other side; and all such causes are to be argued in the order they stand entered, and are not to be adjourned by consent or otherwise, unless the court shall for reasonable cause, verified by affidavit, upon application to be made by either of the parties, their attorney or agent (*at least two days before the day of argument*), otherwise order; and all such causes remaining undetermined at the end of any term, shall, without any new entry, be continued in the book kept by the clerk of the papers, to come on the next term, in the order they stand. *Mich. 1756.*

Where the plaintiff concludes *ad patriam* and defendant demurs, he shall accept notice of inquiry.

That in every case where the plaintiff shall conclude to the country upon the defendant's plea, and shall give notice of trial of the issue upon the paper book, and thereupon the defendant to hinder the trial of the issue shall demur in law upon the replication or plea of the plaintiff, and the plaintiff shall join in such demurrer, and thereupon shall obtain judgment, the attorney for the defendant, shall be obliged to accept of notice of executing a writ of inquiry of damages, from the time of notice of trial given upon the paper book as aforesaid, *R. Hil. 8 Geo. 1.*

Rule to be four days exclusive.

It is said in *N. on R. Trin. 1 Geo. 2.* if the paper book be of an issue in fact, the *four days* for keeping the book are accounted exclusive; if a demurrer, or issue in law, *the four days* are inclusive; but I find no such distinction.

Demurrer.

Definition.

DEMURRER, in law, is a kind of pause or stop put to the proceeding of any action, upon some difficult point which must be determined by the court, before any further progress can be had in it. In every action, the controversy is either as to fact, or as to law; the first, decided by the jury;

jury; the second, by the judges. If the plaintiff's declaration be not sufficient in law, as by not assigning any sufficient trespass, then the defendant demurs to it; if on the other hand the defendant's plea be invalid, the plaintiff may demur in law to the plea, and so on in every other part of the proceeding, and to try the issue the other party joins in demurrer. For this purpose a demurrer book is made up, containing all the proceedings at length, which are afterwards entered on record on a roll of the term it is joined, and copies thereof, called demurrer books, are delivered to the judges two days before the day of argument.

A demurrer is either *general* or *special*; *general* General or special. where no particular cause is alledged; *special* when the particular object is pointed out, and insisted upon as the cause of demurrer; and that as a general demurrer confesses all such matters of fact as are sufficiently pleaded, so he that demurs specially, can take no advantage of any other matter of form than what is expressed therein; but he may of any other matter of substance. *Co. Lit.* 72. 10 *Co.* 88.

A man who demurs generally shall take advantage of all matters which are requisite to shew a good right or title in the plaintiff. *Plow. Com.* 66. *a.* *Hob.* 301.

If there be three counts to the declaration, to which there is a general demurrer, if any one of the counts be good, judgment must be for the plaintiff, if such count can be joined with the other two. *The Duke of Bedford v. Alcock.* 1 *Wils.* 252. Three counts, if one be good, judgment.

If a man demurs for form, he must shew specially the causes of demurrer. 2 *Roll.* 330. *Stat.* 27 *Elizabeth, c.* 5. 4 and 5 *Ann. c.* 16. *R. M.* 1654. *f.* 17.

Defendant cannot demur to a declaration, because it says he was *summoned*, instead of *attached*, without prayingoyer. *Rep. Temp. Hard.* 189.

If there be a general demurrer to the declaration, the plaintiff may apply to a judge for a summons for leave to amend; if not, he may proceed to join in demurrer, On a general demurrer the plaintiff's attorney may make up book.

demurrer, and make up the demurrer book himself, a copy of which he is to deliver to defendant's attorney, charge 4*d.* per sheet and duty, and if not paid for on demand, sign judgment. *R. Tr.* 12 *IV.* 3.

General demurrer to be signed.

A general demurrer must be signed by counsel, or plaintiff may sign judgment; if the plaintiff joins in demurrer, he may proceed by moving for a *concilium* for argument, the same as on a special one.

Cannot waive general issue and give special plea.

The defendant cannot waive the general issue, and instead thereof give a special plea or demurrer, nor waive a general demurrer and give a special demurrer or special plea. But if a special plea or special demurrer be given in, and the book is made up, and delivered to the defendant's attorney, he may strike out the special plea or demurrer, and return it with the general issue or general demurrer. *N. on R. T.* 5 & 6 *Geo.* 2.

The defendant is not bound by a consent to rejoin *gratis*, if the replication affords cause of demurrer.

The defendant obtained time to plead, pleading issuably and taking short notice of trial. The plaintiff demurred to the replication, and plaintiff made up the record, and tried the cause before demurrer heard. *Cur.* said, on motion to set aside the verdict, The construction of the terms put upon defendants, when they ask time to plead, is not to oblige them in all events to join issue to the country, but only where the replication offers a fair issue, and affords no reasonable cause for demurrer; now here the replication not shewing any *tender of a surrender*, does give such a colour of objection as will warrant what the defendant hath done. *Dewey v. Sopp, Sir.* 1185.

Where there are issues in fact and in law, the plaintiff may waive the issues, and take out an inquiry upon the demurrer.

Non assumpsit to three counts, demurrer to the 4th: After judgment on the demurrer, plaintiff takes out a writ of inquiry and executes it. This was moved to be set aside, there being no *nolle prosequi* on the roll; and it was insisted that the plaintiff ought to take out a venire, *tam* to try the issue, *quam* to inquire of the damages upon the demurrer. *Sed per curiam*, That is indeed the course where the issues are carried down to trial before the demurrer

murrer is determined, and in that case the jury give contingent damages; but here the demurrer being determined, and the plaintiff being able to recover all he goes for upon that count, there is no reason why we should force him to carry down the cause to *nisi prius*: and as to the want of a *nolle prosequi* upon the roll, he may supply that, when he comes to enter the final judgment; if not, you will have the advantage of it upon a writ of error. The judgment on inquiry must stand. *Fleming v. Langton*. 1 Str. 532. 574.

Michaelmas Term, in, &c.

London, (js.) Be it remembered, that on Monday next after the morrow of *All Souls*, in this same term, before our lord the king at *Westminster*, comes *A. B.* by *I. T.* his attorney, and brings into the court of our said lord the king, before the king himself, now here, his certain bill against *G. D.* being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself, of a plea of trespass on the case, and there are pledges for the prosecution, to wit, *John Doe* and *Richard Roe*; which said bill follows in these words, to wit, *London, (js.)* (to the end of the declaration) suit, &c.

A general demurrer book, where the demurrer is to the declaration.

And the said *C.* by *J. T.* his attorney, comes and defends the wrong and injury, when, &c. and saith, That the said declaration, and the matters therein contained, are not sufficient in law for the said *A.* to have or maintain his said action against the said *C.* to which said declaration the said *C.* hath no need, nor is he obliged by the law of the land to answer; wherefore, for want of a sufficient declaration in this behalf, the said *C.* prays judgment, and that the said *A.* may be barred from having and maintaining his aforesaid action thereof against him, &c.

General demurrer.

J. M.

And the said *A.* says, that the declaration aforesaid, and the matters therein contained, are sufficient in law for the said *A.* to have his aforesaid action thereof maintained against the said *C.* which said

Joinder.

said declaration, and the matters therein contained, the said *A.* is ready to verify and prove as the court shall award, and because the said *C.* hath not answered the said declaration, nor in any wise denied the same, the said *A.* prays judgment, and his damages by occasion thereof to be adjudged to him, &c. ; but because the court of our said lord the king now here is not yet advised what judgment to give of and concerning the premises, a day is given to the said parties, that they be before the lord the king at *Westminster*, on next after to hear their judgment thereon, for that the court of our said lord the king now here is not yet advised thereof, &c.

Demurrer to a
plea.

And the said *A.* as to the said plea of the said *C.* by him above pleaded, says that the plea aforesaid, in manner and form as the same is above pleaded, and the matters therein contained, are not sufficient in law for the said *C.* to bar the said *A.* from having or maintaining his aforesaid action thereof against him the said *C.* and that the said *A.* is not under any necessity, nor is he bound by the law of the land in any manner to answer thereto, and this he is ready to verify ; wherefore for want of a sufficient plea in this behalf, the said *A.* prays judgment, and his damages by reason of the premises to be adjudged to him, &c.

Demurrer to the
replication.

And the said *C.* as to the said plea of the said *A.* by him above in reply pleaded to the said plea of the said *C.* and the matters therein contained, are not sufficient in law for the said *A.* to have or maintain his aforesaid action thereof against him the said *C.* and that he the said *C.* is not under any necessity, nor is he bound by the law of the land in any manner to answer the same, and this he the said *C.* is ready to verify ; wherefore, as before, he prays judgment, and that the said *A.* may be barred from having and maintaining his aforesaid action thereof against him, &c. And for causes of demurrer in law, according to the form of the statute in that case made and provided, the said *C.* sets down and shews

Causes assigned.

shews to the court here the following causes, to wit (here set forth the causes).

Leave has been given after argument on demurrer to amend the declaration, where the declaration was demurred to. *Luxton v. Robinson*, Dougl. 620. Amendment after demurrer argued.

Where the demurrer is first argued, before any trial of the issues, the court will give leave to amend; but not after the *verdict* found on the issues upon facts, and contingent damages found upon the demurrers, of which there never was an instance. Leave to amend before trial of the issues not after.

Mr. J. Denison. *Robinson v. Rayley*. 1 Burr. 322.

How to make up Demurrer Book on a special Demurrer.

DELIVER a copy of the declaration to the clerk of the papers, who makes up the paper book, and gives a *four days rule* in the margin to receive and return the book.

If defendant's attorney return the book in time, 8d. per sheet defendant, 4d. ditto plaintiff. and proceed as in page 290.

If there be an issue as to part, and a demurrer as to the other part, you may try your cause before you argue the demurrer, or argue the demurrer before trial; in the latter case enter all the proceedings on the roll as in the paper book, and proceed to argument the same as if there was no issue in fact, as that is to be tried afterwards. If there be an issue as to part, and demurrer to the other part, you may try the issue first.

If plaintiff refuses to join in demurrer, get a rule from the master for that purpose, enter it with the clerk of the rules, and serve it; if he does not join in demurrer when the rule expires, sign a *nonpros*. If plaintiff refuses to join in demurrer, how to compel him.

If judgment be given on demurrer for the plaintiff, and the action is for damages, the master marks on the roll, that judgment is for the plaintiff; draw up the rule, pay for same 4s. sign interlocutory judgment with Mr. Clark on treble 1d. paper; pay 6d. then give If judgment for plaintiff. how to proceed.

give notice of inquiry, and proceed to the execution thereof.

If judgment be in debt.

But if the judgment be in debt, draw up the rule and get same stampd with a double half-crown, and proceed to tax the costs thereon; but the roll must be given to the master to mark the amount thereof in the margin, if carried in, Mr. *Edge* must attend the master; pay 3s. 6d. in the whole, then issue execution. As this latter is a judgment of the court, the four day rule is not to be given.

Special demurrer may be waived, and general issue, &c.

You cannot waive a general demurrer, and plead the general issue; but a special one may be waived, and general issue may be pleaded, and notice of set-off may be given at the same time.

Books to be delivered two days.

The demurrer books are to be delivered to the judges only *two days* before argument, formerly was four days. *Vide rule, E. 2 Jac. 2. Wednesday for Friday will do.*

When the Book may be made up by the Defendant.

Where the defendant's attorney may enter the plaintiff's demurrer upon record,

IT is ordered, That if any plaintiff here in court shall demur in law to any plea, rejoinder, or rebutter, by any defendant here in court exhibited, and such defendant joins in such demurrer in law; that then the attorney for the plaintiff shall enter of record such demurrer in law, and in default thereof, upon a rule given by the secondary of this court for entering of such demurrer in law, the attorney for the defendant shall enter of record such demurrer. *R. E. 11 W. 3.*

If the plaintiff demurs or takes issue on the defendant's plea, rejoinder, or rebutter, and the defendant joins therein, and the plaintiff will not make up the book and enter it on record, the defendant may, pursuant to this rule, make up the book and enter it; and when he has made up the book he must deliver it to the plaintiff, and pay him for the entry of his the defendant's pleadings, because

8d. per sheet.

cause the plaintiff may perhaps enter the issue, as he has a right to do at any time before the expiration of the above-mentioned rule given by the secondary, which rule ought to be served on the plaintiff at the same time the book is delivered to him. If the plaintiff does not enter the issue, the defendant may, at the expiration of the rule; and give notice of trial by proviso; but then the plaintiff ought to return to the defendant the money he received from him for the entry on his part. *N. on the above Rule.*

N. B. By the above rule, the book cannot be made up by the defendant until default made by the plaintiff; then make up the paper book, apply to the master for a rule, which he gives on the book or on a piece of paper, that “*unless the plaintiff enters the issue on record on next after let the same be entered on the part of the defendant.*” Enter it at the clerk of the rules; pay 1s. 10d. serve copy at the time you deliver the book.

Issue.

EVERY clerk or attorney of the King's Bench may, according to the ancient rules of the court, make up issues in the following cases, *viz.* Every issue that may be given on the book side in the office.

Not guilty to a new assignment in trespass.

To the bar of son frank tenement.

Comperuit ad diem to a bail-bond.

Nul tiel record to an action of debt on judgment.

In covenant where the defendant tenders an issue to the country.

Every special non est factum; son assault demesne.

All issues and demurrers upon every writ of error, *scire facias*, and *audita querela*.

All repleaders, or other things formerly entered of record, *R. 12 W. 3.*

OF

Of making up the issue on a general plea of *non assumpsit*; or not guilty, &c. where the declaration and plea are of the same term.

Trinity term, in the 31st year of the reign of king George the third.

The first day of term.

London, } Be it remembered, that on Friday next to wit. } after the morrow of the holy Trinity in this same term, before our lord the king, at Westminster, comes John Denn, by Richard Pack his attorney, and brings into the court of our said lord the king, before the king himself, now here, his certain bill against Richard Fenn, being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea of trespass on the case^b, and there are pledges for the prosecution, to wit, John Doe and Richard Roe, which said bill follows in these words, to wit, London, (ss.) John Denn complains (to the end of the declaration), suit, &c. then on a new line enter the plea.

^b As the action is. If in debt (say so) trespass and assault (trespass.)

Plea.

And the said Richard, by A. B. his attorney, comes and defends the wrong and injury, when, &c. and says, that he did not undertake and promise in manner and form as the said John hath above thereof complained against him, and of this he puts himself upon the country; and the said John Denn doth the like, &c. Therefore, let a jury thereupon come before our lord the king, at Westminster, on^c next after by whom, &c. and who neither, &c. because as well, &c. the same day is given to the parties aforesaid, at the same place.

^c The last day of the term, if your cause is tried the sittings after; if in term, the first day of the term. If in the country, the last day of term.

How to make up Issue where the Declaration and Plea are of different Terms.

TRINITY term, in the 31st year of the reign of king George the 3d.

Middlesex, } Be it remembered, that in Easter to wit. } term^a last past, before our lord the king, at Westminster, came John Denn, by Richard Pack, his attorney, and brought into the court of our

^a The term the declaration is of.

our said lord the king, before the king himself, then there, his certain bill against *Richard Fenn*, being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself, of a plea of trespass and assault, and there are pledges for the prosecution, to wit, *John Doe* and *Richard Roe*; which said bill follows in these words, to wit, (to the end of the declaration), suit, &c.

And now at this day, (that is to say) on *Friday Imparlance*. next after the morrow of the holy *Trinity*^b, until ^{b The first day of the term in which the issue is made up.} which day the said *Richard* had leave to imparl to the said bill, and then to answer the same, &c. at which day before our said lord the king, at *Westminster*, comes as well the said *John*, by his said attorney, as the said *Richard*, by *A. B.* his attorney; and the said *Richard* defends the wrong and injury, when, &c. and says, that he is not guilty of the premises above laid to his charge, in manner and form as the said *John* hath above thereof complained against him, and of this he puts himself upon the country, and the said *John* doth the like, &c. therefore let a jury thereupon come, &c. (as in the other).

Enter only one *imparlance*, if the plea be of two or three terms subsequent to the declaration, as for instance, declaration of *Michaelmas* term, 30 G. 3. plea of *Easter*, and you try the cause of *Trinity*; imparl over to the first day of *Trinity*, and make up your *issue* as of that term, as the want of a continuance day cannot be assigned for error in this case.

Vide stat. of Jeof. 32 H. 8. c. 30. 4 & 5 A. c. 16.

Where there are two or more *issues* taken upon the defendant's plea, then after the tender of the last *issue*, "and of this he puts himself upon the country, and the said plaintiff doth the like," add this, "Therefore as well to try this *issue* as the said other *issue* above joined, let a jury thereupon come before our lord the king, at *Westminster*, on next after by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. the same day is given to the parties asore said, at the same place."

How to make up an Issue against two Defendants, where one lets Judgment go by Default, and the other pleads.

Issue against two defendants.

TO the end of the defendant's plea, and then join *issue*, and the said *A. B.* doth the like: then go on thus: And the said *E.* in his own person, comes and defends the wrong and injury, when, &c. and says nothing in bar or preclusion of the said action of the said *A.* by which the said *A.* remains therein undefended against the said *E.* for which the said *A.* ought to recover his damages by occasion of the premises; but because it is unknown to the court here, what damages the said *A.* hath sustained by means thereof; and because it is also at present unknown to the court here, whether the said *C. D.* will be convicted of the premises upon which the above *issue* is joined, between the said *A.* and the said *C.* or not; and because it is necessary and convenient that there be but one taxation of damages in this suit; therefore, let the giving of judgment in this behalf against the said *B.* be stayed, until the said *issue* between the said *A.* and *C.* be determined; and as well to try the *issue* above joined between the said *A.* and *C.* as to inquire against the said *E.* what damages the said *A.* hath sustained in this behalf, let a jury thereupon come before our lord the king, at *Westminster*, on the next after by whom, &c. and who neither, &c. because as well, &c. the same day is given to the said *A.* and *C.* at the same place.

Unica taxatio.

The notice of trial.

In this case the defendant who lets judgment go by default must have notice of the trial of the *issue* and assessment of the damages, which may be thus:
 " Take notice, that the *issue* joined in this cause
 " between the above-named plaintiff, and the above
 " named *C.* will be tried at the next assizes, to be
 " held at *W.* in and for the county of *W.* and
 " that at the same time the damages will be assessed
 " by

the
of
sa
co
sa
rif
the
bef
of
said
who
to r
the
made
the
every
them,
lord t
the sai
in the
upon.
If it
lip cou
And
parties
the next
marthen
county
the said

" by the same jury against you in this cause upon
 " the judgment taken by default. Dated, &c."

If the *venue* is in a county palatine, there must be an award of a special *venire* and *mittimus*, as follows :

Therefore let a jury be made thereof, and because Issue in Co. Pal. Lanc. the said issue between the parties aforesaid, ought to be tried by men of the county palatine of *Lancaster*, to wit, of the body of the said county where the writ of our said lord the king doth not run, and not elsewhere ; therefore to try the issue between the parties aforesaid above joined, let the record of the plaint aforesaid be sent to his majesty's justices of the said county palatine of *Lancaster*, so that the same justices, by his said majesty's writ of that county, to be duly made out, and to the sheriff of the same county directed, do command the same sheriff, that he cause twelve good and lawful men, of the body of the said county of *Lancaster*, to come before the said justices, at their next general sessions of assize to be holden for the said county, after the said record shall be delivered to them, each of whom, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. and when the verification and issue aforesaid shall be there made and tried, that then the said justices shall send the record of the plaint aforesaid, together with every thing that shall be done thereupon before them, in his said majesty's court there, to our said lord the king at *Westminster*, at a certain day which the said justices shall appoint the said parties to be in the same court, there to hear judgment thereupon.

If it is a *Welsh* issue, to be tried in the next *Eng- Welsh* issue. *Welsh* county, the award of the *venire* is thus :

And because the issue aforesaid, between the parties above joined, ought to be tried by men of the next *English* county to the said county of *Garmarthen*, and not elsewhere ; and because the county of *Hereford* is the next *English* county to the said county of *Garmarthen* ; therefore let a jury

of the said county of *Heresford, &c.* come before our lord the king at *Westminster*, on *Monday* next after *Michaelmas*, who neither, *&c.* to recognize, *&c.* The same day is given to the said parties there, *&c.*

N. B. In a *Welsh* issue, when tried in the next *English* county, the *jurata, venire, and distringas*, are the same as in common cases.

Issue where sheriffs are parties.

If the sheriffs are parties to the suit, enter to the end of the *similiter*, then say: And because it is suggested to the court of our lord the king, now here, that the said *A. B.* and *C. D.* are sheriffs of the city of *London*, it is therefore commanded to the coroner, that he cause to come before our lord the king, at *Westminster*, on *Monday* next after *Michaelmas*, twelve, *&c.* *N. B.* The *venire* and *distringas* are returned by the coroner, pay him *4s. 4d.* if common; if special, *8s. 8d.*

How to be ingrossed.

These issues are to be ingrossed on treble penny paper, and the attorney charges *4d. per sheet* for the copy, besides stamps; and if not paid for on demand, the plaintiff may sign judgment. *R. Trin. 12 W. 3.* If the defendant's attorney be absent, the plaintiff cannot regularly sign judgment till 24 hours after issue left.

How to compel the Entry of the Issue.

If the plaintiff's attorney delays to enter the issue, get a rule from the master, on the back of the issue delivered, enter it with the clerk of the rules, pay *1s. 10d.* and serve plaintiff's attorney with a copy, naming the cause thus: *Denn v. Fenn, Friday next after the morrow of All Souls, to enter the issue. Entered,* and he must, before the rule is out, *enter the issue on record (the roll) and file same in the Treasury, or a nonpros may be signed.*

But if plaintiff wants time, he may apply to a judge for a summons, who will grant him a reasonable time to enter the issue.

Cannot give a rule same term issue is joined, to enter issue, unless, &c.

If the action be laid in *London* or *Middlesex*, defendant ought not to give a rule to enter the issue the

I T
fe
cause
as in
all ca
or M
By
That
before
or at
the def
cities r
has bee
trial.

the same term issue is joined, unless notice of trial hath been given; and, in a country cause, plaintiff is no ways bound to enter his issue the same term; therefore you cannot have a rule for that purpose till the next term. *N. on R. M. 4 Ann.*

The plaintiff must enter his issue if the action be laid in London or Middlesex, and bring the record into the office within four days after notice of the rule; if in the country, before the continuance day of that term, or a nonpros may be signed and entered.

N. on Rule M. 4 Ann.

It is ordered that no record of nisi prius shall be sealed or passed at the nisi prius office by the custos brevium of this court, or any clerk of that office, before the issue in that cause be fairly entered on record, or an incipitur thereon, and such entry, with the record of nisi prius, be first brought to, and signed by the secondary of this court, for which no fee shall be demanded or paid, but the usual and accustomed fee due to the chief clerk of this court for entry of such issue on record. *R. M. 5 Ann.*

For the entry of the issue, vide *Docket*.

Trial.

IT is ordered that due notice be given to the defendant upon all trials at every assizes, when any cause shall be carried to trial, as well in old causes as in new causes; and likewise to the plaintiff in all causes, to be tried by proviso as well in London or Middlesex, as at assizes. *R. M. 1651.*

By stat. 14 Geo. 2. c. 17. s. 4. it is enacted, That no cause whatsoever shall be tried at nisi prius, before any judge or justice of assize or nisi prius, or at the sittings in London or Westminster, where the defendant resides above forty miles from the said cities respectively, unless notice of trial in writing has been given at least ten days before such intended trial.

8 days in London or Middlesex.

The practice is, if defendant lives within forty miles of London, eight days notice exclusive of the day is to be given, if the venue be laid in London or Middlesex.

Sunday.

Sunday is accounted a day in these notices, so it be not the day on which the notice is given.

Mod. Caf. L. and Eq. 21.

But if the venue be laid elsewhere, then ten days at least by the above statute.

When 14 days.

If the defendant lives above forty miles from London, and the cause is to be tried there, or in Middlesex, then the practice is, that he shall have fourteen days notice, according to the ancient practice, exclusive. For the explanation of this, see Barnes's N. 305. *Bowler v. Jenkin.*

Explanation for affizes.

If notice of trial be given on the 22d of February for the next affizes, and the commission day is the 4th of March, it is good notice, for one day is to be included, and the other excluded.

Notice of trial delivered to the turnkey against a prisoner is good. *Whitehead v. Barber, Str. 248.*

In London.

Likewise if the trial is to be in London or Middlesex, the fittings after Hilary term, which ends the 12th of February, such fitting is the 14th for London; the 6th is good notice, and 5th for Middlesex, being the 13th.

When a Term's Notice requisite.

By a note on R. 4 Ann. it is said, eight days exclusive is sufficient notice of trial, or of executing inquiry in all cases, except causes in London and Middlesex, where the defendant lives above 40 computed miles from London, then 14 days notice must be given; and likewise, except causes wherein no proceedings have been had within four terms after issue joined, then a term's notice must be given, and so likewise by proviso (unless the cause has been stayed by injunction or privilege).

If notice be given within the year, from the day of the last proceeding, having no regard to the terms, it is sufficient.

The

The court held, that the giving notice of trial at the end of half a year after issue joined, would prevent the necessity of giving a term's notice, till a year after the last notice, which was given and countermanded. *Str. 531. Green v. Gauntlett.*

It was settled that when a term's notice of trial is required upon an old issue, the notice must be given before the *essoign day*, and that is a full term. *Bogg v. Rose, Str. 1164.*

A judge's summons, if no order made, is no proceeding; but a notice of trial, though countermanded, is, and so if an order be obtained.

The construction of this rule formerly was held, that a notice of the intention to proceed was given before the *essoign* of the 5th or other subsequent term by giving a notice of trial; but the practice now is, to give a whole term's notice of trial without the former note, before the *essoign day*.

Plea was delivered in *Hilary term 1783*, and no proceedings had till the 10th *March 1784*, when issue delivered, and ten days notice of trial given for the next assizes to be held at *Lancaster*; it was said by the master, that there ought to be a whole term's notice.

Debt on *replevin bond*, verdict for plaintiff; rule why verdict should not be set aside, cause having been suspended, after issue joined for above a year, and then brought to trial without a term's notice. Lord *Mansfield* expressed his indignation at the defendant's endeavouring to take advantage of a delay occasioned by himself, to protect himself against a deed under his own hand and seal; it was insisted that the trial without a term's notice was irregular, and that the court of exchequer before answer, would have given leave to have proceeded to trial, and that it was universally understood in practice, that an injunction is no excuse for not complying with the established rule. Mr. *J. Buller* said, that the practice was as had been stated: that it was grounded on the principle, that the injunction was no proceeding in the cause depending in this court;

but that he thought this a case where the court might very well alter the practice. *Rule discharged. Hayley v. Ryley. Dougl. 71. Vide 2 Black. 784. 919.* held that a delay by injunction from the nature of the thing, is an exception to the rule.

When new notice requisite.

If the plaintiff gives notice of trial and does not proceed, he cannot try it without new notice, unless by consent or rule of court. *M. 1654. S. 18.*

Notice of trial or inquiry given to defendant, when good.

Notice of trial, or of executing a writ of inquiry, given to a defendant, when his attorney is known, is not good a notice; but when his attorney is not known, then the notice may be given to the defendant. *Say 133.*

Notice of trial for London.

Doe v. Roe. Take notice of trial in this cause for the sittings after this present *Michaelmas* term to be held at the *Guildhall* of the city of *London*. Dated, &c. Your's, &c. *A. B.* plaintiff's attorney. Mr. *C. D.* defendant's attorney.

For Middlesex.

Doe v. Roe. Take notice of trial in this cause for the sittings after this present *Michaelmas* term, to be held at *Westminster Hall*, in the county of *Middlesex*. If it be at the sittings within term, say, "for the second sittings within this present *Michaelmas* term, to be held at, &c."

Country.

If for the country, say, "for the next assizes to be held at *Oxford*, in and for the county of *Oxford*."

Notice of trial on special issue, to serve for the general issue.

Upon the delivery of any paper book wherein an issue is joined, and notice of trial given on the back of the book; if the same be afterwards waived, and the general issue given, the notice which was given for the trial of the special issue, shall serve for notice of the general issue. *N. on Rule Hil. 8 Geo. 1.*

Trial by Proviso.

Trial by proviso is fallen into disuse, since the stat. 14 Geo. 2. c. 17. where the defendant may proceed to have judgment as in the case of a nonsuit (unless in some cases).

By stat. 7 and 8 W. 3. c. 32. if any defendant be minded to bring the issue to trial by proviso (when by

by course he may), he may of the issuable term next preceding such intended trial to be had at the next assizes, sue a new *venire facias* to the sheriff in form aforesaid by proviso, and prosecute the same by writ of *habeas corpora*, or *distringas*, with a *nisi prius*, as though there had not been any *venire facias* sued out or returned in that cause, and so as often as the matter shall require.

That in *prohibition* it is said either party may carry *Prohibition, &c.* down the record, so that it may happen two may be carried at one time. That in civil causes, the defendant cannot carry down a cause to trial by proviso, till after default in the plaintiff, except in some special cases, as in *quare impedit*, *replevin*, and *prohibition*, to have a writ to the bishop to return a consultation, *Clerk's Instructor*, 73. and also that there is no trial by proviso in the king's case without leave of the court. *Ibid.*

A trial by proviso was ordained by the statute, to the end that the defendant might free himself of suits brought against him, by trying the issue depending betwixt them, in case the plaintiff doth neglect to try as he ought, by the rules of the court. *For what it was ordained.*

No trial can be had by proviso in *London* or *Middlesex*, until default made by the plaintiff after the issue is entered on record; nor in *country* causes till the plaintiff hath made default in trying his issue the next assizes after the issue is entered; and in neither case, till a rule for trial by proviso be entered. *N. on Rule M. 4 Ann.* *None can be had until default made.*

By the rules of the court, if the plaintiff will not try his issue after it is joined, in such time as he ought by the course of the court, in such case the defendant may make out the *venire* by proviso, which runs thus; after you come to the words *have put themselves on that jury*, say, "Provided always, that if two writs thereof should come to you, one of them only return and execute, and have there then this writ. *Witness, &c.*" *When defendant may make out venire.*

The defendant in this case must give the plaintiff due notice of trial, *R. M. 1651.* because it lies in the defendant to give notice of trial.

the election of the defendant, either to try the cause by proviso or not; and the plaintiff cannot presume he will try it, being defendant in the action, except the defendant give him notice that he will try it.

Plaintiff may
also give notice.

When the defendant hath given the plaintiff notice of trying the cause by proviso, the plaintiff may also give him notice of trial, and both of them may return *venires*, &c. and make several records of *nisi prius*, and each may enter the cause for trial; but the trial shall be by the plaintiff's record if he enters it; and if he refuses, or withdraws it, then the defendant may proceed on his record.

The master gives the rule to make up the record by proviso on the back of the issue. *Fiat nisi prius per proviso si querens fecerit defaultam*, which is entered at the clerk of the rules. Pay 1s. 10d. serve a copy. Str. 1055.

Costs.

If the defendant does not proceed after notice of trial, he is to pay costs to the plaintiff. *N. on Rule Mich. 4 Ann. Str. 797.*

Replevin.

The defendant shall not try by proviso, till there be laches in the plaintiff; except in cases where the defendant is as plaintiff, as in *replevin*, *prohibition*, and *quare impedit*.

If record has
once been carried
down it is suffi-
cient, and de-
fendant must try
it by proviso.

Issue joined in *Hilary Term* 1786, and plaintiff nonsuited, which was set aside, plaintiff did not proceed at the next assizes; on motion for judgment as in the case of a nonsuit, it was held, that the defendant might have carried down the record by proviso, for he had already complied with the statute in having carried the record down to trial once. *Rule disch.*

Rule by proviso,
if obtained any
time before trial,
will do, though
after notice of
trial given.

King v. Piggott. Term Rep. 1 V. 492. The same defendant, on the 8th of *March* 1787, gave notice of trial (the commission day being the 19th), and on the 10th of *March* obtained and served the usual rule for a trial by proviso, and the plaintiff not appearing, was nonsuited: motion to set it aside. The court said, that, according to the old established practice, wherever the defendant carries down the record to trial by proviso, he must obtain a rule, that in case the plaintiff should make default, he

might

might be at liberty to go to trial. But the only use of that rule is, that if two records are carried down to trial (the one by the plaintiff, and the other by the defendant), the former only should be tried. Then it is quite sufficient if the plaintiff has this writ at the trial. Besides, no inconvenience can result from this practice, because if the defendant does not carry down this record to trial after notice, he is liable to pay costs. *Rule refused.* In criminal cases no such rule is obtained at all. *Per Master Templer, ibid. 695.*

How to put off Trial.

IF one of the defendant's witnesses be out of the way, and cannot be subpoena'd to come to the trial, he must apply to the court to put the same off: this application ought to be made *two days* before the day of trial, and is many times made without notice, as it is a rule to shew cause; but I should advise notice to be given if made so late as two days, in which case the notice may contain, "*that the court will be moved on, &c. that the trial may be put off until next Michaelmas term, on account of the absence of a material witness, and in the mean time all proceedings be staid;*" then prepare an affidavit, which ought to be made by the defendant (unless he is abroad), to this effect.

John Doe, plaintiff,

In the King's Bench.

and

Richard Roe, defendant.

R. R. of, &c. the defendant in this cause, maketh Affidavit
oath and faith, that issue was joined in this cause this present *Trinity* term, and that notice of trial was given for the last sittings within the said term; and this deponent further saith, that *I. M. late of, &c.* is a material witness for him this deponent, in the said cause, as he is advised and believes to be true, and that he cannot safely proceed to the trial thereof, without the testimony of him the said *I. M.* And this deponent further saith, that he hath endeavoured

deavoured to find the said *I. M.* out; that he hath been to the house of the said *I. M.* and was informed that he was gone to *Exeter*, in the county of *Devon*; and that he this deponent hath sent there, for the purpose of subpoenaing him; but that the said *I. M.* is gone from there, as this deponent hath heard, and verily believes to be true; and that he this deponent cannot get any information where the said *I. M.* is, but is informed that he will be at home in three months. And that he this deponent hopes and expects to be able to procure the presence of the said *I. M.* within the first sittings of next *Michaelmas* term.

This is a rule to shew cause, pay 6s. fee to counsel 10s. 6d.; draw up and serve rule on the attorney of the other side, and make rule absolute if no cause shewn.

What the affidavit ought to contain.

It is laid down, that the affidavit to put off the trial for want of witnesses, must shew "*such witnesses to be absent and material, and that the defendant cannot go safely to trial without such evidence; that he has hopes and expectation of procuring the presence of such witnesses within a reasonable time (specifying it); that there has been no laches, or neglect, to procure their testimony.*" 3 Burr. 1514.

A trial is not to be hurried to do injustice,

A trial shall not be so hurried, as to do injustice to the defendant; an affidavit in common form may be sufficient where no cause of suspicion appears; but men take such latitude to swear in the common form, that where a *suspicion arises* from the nature of the question, or from *contrary affidavits*, the court will examine into the *ground* upon which the delay is asked, and have refused to put off a trial, notwithstanding an affidavit in common form. *Ibid. Rex v. D'Eon.*

What will satisfy the court to put off a trial.

It is necessary, 1st, to satisfy the court that the persons are material witnesses; 2d, to shew that the party applying has been guilty of *no laches* nor neglect, in omitting to apply to them and endeavour to procure their attendance; and, 3d, to satisfy the court that there is a reasonable expectation of his being

being able to procure their attendance at the future time to which he prays the trial to be put off. *Ibid.*

Short Notice of Trial.

IT is ordered that where short notice of trial is to be accepted in country causes, such notice shall be given at least *four days* before the commission day, one day *exclusive*, and the other *inclusive*. *E. T.* 30 *Geo.* 3.

Short notice to be four days before commission day.

Countermand of Notice of Trial.

THIS also must be in writing, and if the action be laid in *London* or *Middlesex*, and defendant lives within 40 miles of *London*, *two days*, exclusive of the day in which the countermand is delivered, are sufficient; *Str.* 849. but if the *venue* be laid in the country, *six days* are to be given, at least, before the intended trial, pursuant to the statute 14 *Geo.* 2. c. 17; or if the *venue* be laid in *London* or *Middlesex*, and the defendant lives above 40 miles from *London*, *six days*, at least, must also in that case be given.

"*Doe v. Roe*, I hereby countermand the notice of trial given you in this cause. Yours, &c."

Countermand of notice of trial.

Which is served on defendant's attorney.

Continuance of Notice of Trial.

THIS is only given in *London* or *Middlesex*, which plaintiff may do; as for instance, if the plaintiff give notice of trial for the *first sitting* in term, he may, by giving notice, *continue* his notice of trial for the second or third sitting or sittings after term, but it cannot be continued only once in a term. *Str.* 1119. *Green v. Gifford*. *Two days* are sufficient; one day *inclusive*, the other *exclusive*: as for instance, *Monday* for *Wednesday* is good.

Notice of continuance.

"I hereby continue the notice of trial given you
" in

"in this cause to the sitting after this present
 "Hilary term." Dated, &c.

Costs for not proceeding to Trial.

Costs,

IF the plaintiff does not proceed to trial, or countermand in time, defendant on affidavit of attendance, and necessary expences, shall have his costs taxed, *R. Mich. 1654. sec. 18.* But although the plaintiff does not proceed to trial, whereby costs are taxed for the defendant, and afterwards gives new notice of trial, yet the court will not stay the trial for not paying them (except in ejectment), because defendant hath another remedy to recover them. *N. on R. M. 4 Ann. (c.)*

Trial put off on payment of costs, must be paid, or may proceed.

Trial put off upon payment of costs, the defendant did not pay, plaintiff proceeded to the trial, and the court was moved to set it aside on payment of costs, and the costs of the motion; but it was held that it was a conditional rule, and that the costs ought to have been paid, and refused to set aside the verdict.

Pauper.

A pauper shall not pay costs for not going to trial, *Sir. 983. 420.* but you may move to dispauper him. *Sir. 983.*

Affidavit to move for costs for not going to trial.

If the plaintiff does not proceed to trial pursuant to his notice, you may move the court for the costs, upon an affidavit, stating, "That the action was commenced in *Easter* term, that in *Trinity* term issue was joined, and notice of trial given thereon for the sittings after the said term, and that the plaintiff did not proceed to the trial thereof, nor did he countermand such notice."

How to move.

No notice is requisite.

Give this affidavit to counsel, with half a guinea, who will move for a rule, which is referred to the master in the first instance; draw up same at the clerk of the rules, pay 5s. 6d. get appointment thereon, from the master to tax the costs; if not paid, a demand must be made by defendant's attorney on plaintiff; and if he neglects to pay, make affidavit of such demand and refusal, move for an attachment, which is absolute in the first instance.

N. B.

N. B. The rule may be made to be paid to defendant or his attorney.

J. W. of, &c. and *C. D.* of, &c. severally make oath and say, and first this deponent *J. W.* for himself saith, That he did personally serve the above-named plaintiff with a true copy of the rule, and the master's *allocatur* thereon, hereto annexed, and at the same time shewed him the said original rule and master's *allocatur* thereon, and that he this deponent then demanded of him the costs allowed by the master on the said rule, but that the said plaintiff did not then, nor at any time since, pay the same to this deponent, and the same now remains unpaid to this deponent. And this deponent *C. D.* for himself saith, That he hath not received the said costs, or any part thereof, but the same now remains due and unpaid to this deponent.

Affidavit of demand and refusal, if payable to the attorney only.

This is a rule absolute in the first instance on the master's *allocatur* for costs merely, draw up the rule, and then take same to your clerk in court, at the Crown-office, who will make out attachment, pay 16s. get warrant thereon, and give it to your officer. His fee is one guinea.

Of Judgment as in Case of a Nonsuit.

TRIALS by proviso are now almost totally disused; a more eligible remedy being given to the defendant in case the plaintiff delays proceeding to trial in due time by stat. 14 Geo. 3. c. 17. which enacts, That where any issue shall be joined in any action or suit at law, and the plaintiff or plaintiffs in any such action or suit have or hath neglected to bring such issue on to trial, according to the course and practice of the court; the judges at any time after neglect, upon motion made in open court, due notice having been given thereof, may give the like judgment for the defendant, as in cases of nonsuit, unless the judges shall, upon just and reasonable terms, allow any further time or times for the trial

of

of such issue. And if the plaintiff or plaintiffs shall neglect to try such issue within the time or times so allowed, then, and in every such case, the judges shall proceed to give such judgment as aforesaid; and this judgment is to have the same force as judgments of nonsuit, and the defendant to be allowed costs in any action or suit, where they would upon nonsuit be intitled to same, and in no other action.

Before judgment as in the case of a nonsuit can be moved for, the issue must be entered on record.

If an issue in a town cause be joined in *Trinity* term, and delivered with notice of trial for the sittings after *that term*, and the plaintiff does not proceed to trial, the defendant may move for judgment in *Michaelmas* term as in case of a nonsuit.

If an issue is delivered in *Trinity* term as of that term in a town cause, and no notice of trial is given, yet if the plaintiff was in time to have given notice for the sittings in or after term, and did not proceed to the trial thereof, this motion, it is said, cannot be made until *Hilary* term, because he has not said (by giving notice of trial) that he is ready to proceed.

If the plaintiff delivers his issue so late in *Trinity* term, as not to be able to give notice of trial for the sitting after that term, then the defendant cannot move until the *Hilary* term following, *Michaelmas* term being the term in which he makes default.

If an issue be joined in *Trinity* term, and delivered in a country cause with notice of trial for the then next assizes, if the plaintiff does not try his cause, the defendant may move for judgment as in the case of a nonsuit in *Michaelmas* term (although he compel the plaintiff by rule to enter his issue in that same *Michaelmas* term).

If an issue be delivered so late in a country cause, that the plaintiff could not give notice of trial as of *Trinity* term, then the defendant cannot move for judgment as in the case of nonsuit until *Easter* term following (his default not happening till Lent assizes).

How

How to proceed.

In order to proceed regularly (the issue being entered on record,) move the court on the following affidavit; notice of this motion *need not be given*.

Lest. 265. This cannot be done in replevin. *Sayer of Costs 142.* But the Common Pleas did it in *E. 26 Geo. 2.* Vide *Barnes's Notes, Bentley v. Scott, 317.*

J. W. of, &c. attorney for the defendant in this Affidavit.
cause, maketh oath, and saith, That *issue* was joined in this cause, in *Hilary* term last past, and notice of trial was given for the sittings after the said term; and that the said plaintiff did not proceed to the trial thereof pursuant to the said notice.

Sworn, &c.

J. W.

Give it to counsel with 10s. 6d. and remember to have your roll in court; or, if you are at *Westminster* before the sitting of the court, *Mr. Austin* will mark it in the treasury, "*read,*" pay 1s. 6d. in the evening draw up your rule, pay 6s. serve copy on plaintiff's attorney, make affidavit of the service; give it to counsel with one guinea, to make it absolute, which cannot be moved by him till the day after the day for shewing cause.

On the part of the plaintiff, it is necessary for Plaintiff must shew some excuse.
him to shew some reasonable excuse why he did not proceed to trial, such as the absence of a material witness, &c. but in general, undertaking peremptorily to try, at the next sittings, or next assizes, serves in this court, after the first notice only; if after two notices, the court will expect a *real excuse*, as they will after the first notice in penal actions, not choosing such kind of actions should hang over the head of the defendant. Insolvency of the defendant since the action brought, is a good excuse for not proceeding to trial, for it would be extremely hard, if a party should be obliged to proceed, and put himself to expence without a possibility of recovering either debt or costs. *Bayley v. Wilkinson, Dougl. Rep. 670.*

Action

When not intitled to this judgment.

Action against two on a joint promise; judgment against *Walker* by default; issue joined by *Goyton*, and the plaintiff neglected to bring it on to trial, and the common rule for judgment as in the case of a nonsuit obtained. *Court held*, that as the plaintiff was not liable to be nonsuited at the trial, the defendant therefore was not intitled to this judgment. *Weller v. Goyton and Walker.* 1 *Burr.* 359. 1 *Ld. Raym.* 716. 12 *Mod.* 651.

If once the cause has been carried down, defendant must afterwards take it down by proviso.

Held that plaintiff having once carried down the record to trial, and nonsuited, which was set aside, he had complied with the statute; therefore defendant in this case must carry it down by proviso: *King v. Pippett.* 1 *Term Rep.* 492.

If issue was joined early enough for the next assizes, yet plaintiff not bound to give notice.

Issue was joined in a country cause early enough in last *Trinity* term to have given notice of trial for the summer assizes; and because no such notice was given, motion in *Michaelmas* term for judgment as in the case of a nonsuit. *Court*, the plaintiff is not bound to give notice of trial till the term succeeding that in which issue was joined, and that in this case, plaintiff had given notice of trial in this term. *Hall v. Buchanan.* 2 *Term Rep.* 734.

If cause carried down, and made a remanet, no judgment.

If the cause has been carried down, and although made a remanet on certain conditions not complied with, yet judgment as in the case of a nonsuit shall not be given, for the statute is complied with by carrying it down once. *Mewburn v. Langley.* 3 *Term Rep.* 1.

Rule discharged on affidavit which is false, court will not open the matter again.

If a rule to shew cause why there should not be judgment as in the case of a nonsuit be discharged, on an affidavit which contains an answer false in itself, the court will not afterwards open the matter on an affidavit which disproves the former one; but if the matter was thought of previous, the court will suspend their judgment on it till the matter is examined. *Davis v. Cottle.* 3 *Term Rep.* 406.

Replevin.

Per Cur. In replevin both parties are actors, and as the defendant might have carried down the record by proviso, it is an answer to the application of judgment as in the case of a nonsuit. *Jones v. Cannon.* 3 *Term Rep.* 661. *C. P. contra.*

You

You must not only shew the absence of a material witness, but he must be named, and that all endeavours were used to find him out, and that you expect him home soon, naming the time: and if the court put it off, it is only from term to term.

If the defendant makes the rule absolute, draw up same at the clerk of the rules; pay 5s. then get a double half crown stamp put upon the rule, bespeak the roll of Mr. *Edge*, so as the master may mark the costs; pay in term time 1s. 6d. in vacation 5s. 10d. more for the keys of the treasury, chief clerk's fee 4s. 6d.

If the cause is put off on a peremptory undertaking, the plaintiff must draw up the rule, pay 7s. and serve it on the defendant: and if he does not proceed to the trial, then apply for an office copy of the rule; pay 3s. 6d. and move the court for judgment on the following affidavit; fee to counsel half a guinea.

J. K. of, &c. attorney for the defendant in this cause, maketh oath and saith, that this honourable court was moved in last *Hilary* term for judgment as in the case of a nonsuit, and upon shewing cause, the plaintiff peremptorily undertook to bring on the said issue to be tried at the first sittings within this present *Easter* term; whereupon the annexed rule was made: And this deponent further saith, That the plaintiff did set down the said cause (*as the case is*) for trial in pursuance of the said rule, but withdrew his record, and did not proceed to the trial thereof.

Trial at Bar.

AFTER issue joined, and not before, *Str.* 696. you may move to have a trial at bar, which must be by special jury, *R. Trin.* 8 *W.* 3. if attorney of one side shall make default to appear to strike out twelve, the secondary shall name the jury in his absence and strike out twelve, and the rest to be returned (but this cannot be had in *London*, the citizens not being to be brought out of the city); *Str.* 854. they are allowed

When not intitled to this judgment.

Action against two on a joint promise; judgment against *Walker* by default; issue joined by *Geyton*, and the plaintiff neglected to bring it on to trial, and the common rule for judgment as in the case of a nonsuit obtained. *Court's held*, that as the plaintiff was not liable to be nonsuited at the trial, the defendant therefore was not intitled to this judgment. *Weller v. Geyton and Walker. 1 Burr. 359. 1 Ld. Raym. 716. 12 Mod. 651.*

If once the cause has been carried down, defendant must afterwards take it down by proviso.

Held that plaintiff having once carried down the record to trial, and nonsuited, which was set aside, he had complied with the statute; therefore defendant in this case must carry it down by proviso. *King v. Pippett. 1 Term Rep. 492.*

If issue was joined early enough for the next assizes, yet plaintiff not bound to give notice.

Issue was joined in a country cause early enough in last *Trinity* term to have given notice of trial for the summer assizes; and because no such notice was given, motion in *Michaelmas* term for judgment as in the case of a nonsuit. *Court*, the plaintiff is not bound to give notice of trial till the term succeeding that in which issue was joined, and that in this case, plaintiff had given notice of trial in this term. *Hall v. Buchanan. 2 Term Rep. 734.*

If cause carried down, and made a remanet, no judgment.

If the cause has been carried down, and although made a remanet on certain conditions not complied with, yet judgment as in the case of a nonsuit shall not be given, for the statute is complied with by carrying it down once. *Mewburn v. Langley. 3 Term Rep. 1.*

Rule discharged on affidavit which is false, court will not open the matter again.

If a rule to shew cause why there should not be judgment as in the case of a nonsuit be discharged, on an affidavit which contains an answer false in itself, the court will not afterwards open the matter on an affidavit which disproves the former one; but if the matter was thought of previous, the court will suspend their judgment on it till the matter is examined. *Davis v. Cottle. 3 Term Rep. 406.*

Replevin.

Per Cur. In replevin both parties are actors, and as the defendant might have carried down the record by proviso, it is an answer to the application of judgment as in the case of a nonsuit. *Jones v. Cansannon. 3 Term Rep. 661. C. P. contra.*

You

You must not only shew the absence of a material witness, but he must be named, and that all endeavours were used to find him out, and that you expect him home soon, naming the time: and if the court put it off, it is only from term to term.

If the defendant makes the rule absolute, draw up the same at the clerk of the rules; pay 5s. then get a double half crown stamp put upon the rule, bespeak the roll of Mr. Edge, so as the master may mark the costs; pay in term time 13. 6d. in vacation 5s. 10d. more for the keys of the treasury, chief clerk's fee 4s. 6d.

If the cause is put off on a peremptory undertaking, the plaintiff must draw up the rule, pay 7s. and serve it on the defendant: and if he does not proceed to the trial, then apply for an office copy of the rule; pay 3s. 6d. and move the court for judgment on the following affidavit; fee to counsel half a guinea.

J. K. of, &c. attorney for the defendant in this cause, maketh oath and saith, that this honourable court was moved in last Hilary term for judgment as in the case of a nonsuit, and upon shewing cause, the plaintiff peremptorily undertook to bring on the said issue to be tried at the first sittings within this present Easter term; whereupon the annexed rule was made: And this deponent further saith, That the plaintiff did set down the said cause (*as the case is*) for trial in pursuance of the said rule, but withdrew his record, and did not proceed to the trial thereof.

Trial at Bar.

AFTER issue joined, and not before, Str. 696. you may move to have a trial at bar, which must be by special jury, R. Trin. 8 W. 3. if attorney of one side shall make default to appear to strike out twelve, the secondary shall name the jury in his absence and strike out twelve, and the rest to be returned (but this cannot be had in London, the citizens not being to be brought out of the city); Str. 854. they are allowed

allowed in issuable terms, if the court pleases; they are granted either upon the value of the lands, or difficulty of the title, for which reason the court will not grant them till *issue* joined, 12 *Mod.* 331. nor can they be granted, though the parties consent, without leave of the court. *Str.* 696.

It is said, trials at bar are never allowed in an issuable term, unless the crown be concerned in interest. *N. on Rule M. 4 Ann. (c.)*

What a proper case.

The most proper case for a trial at bar is, where it appears that a question of law, of some nicety, will arise, and that this will be so complicated with a question of fact, that the whole matter must be determined by the jury, under the direction of the court. *Trin. 4 Geo. 3. Whitaker v. Burrow, C. B.*

Grounds for granting a trial at bar, are value, length, and difficulties, and court may lay the party applying under *nisi prius* costs, and paying bar costs.

Partridge shewed cause against a trial at bar that lessor of plaintiff was in such indigent circumstances as not to be able to bear the expence, and that one of his witnesses was a woman of eighty who might die before the trial. The value of the premises 2000*l.* a year, and the question whether a codicil by which they were devised was duly executed. 2 *Salk.* 648. *cited.* Court were of opinion, that this was a case fit for a trial at bar; but said, as it was a favour asked by the defendant, they would lay him under terms, that if he succeeded, he should only have *nisi prius* costs; but if lessor were to succeed, he should have bar costs; and that the old witness should be examined upon interrogatories, and her depositions read, if she should die before the trial. That the cause should be tried by a *Middlesex* jury, instead of one from *Norfolk*, where the premises were situated. *Holmes v. Brown. Dougl.* 438.

Court will exercise their own discretion.

Upon application for a trial at bar, the court will in every case exercise its own discretion, upon the peculiar circumstances thereof. *The King v. Amery. 1 Term Rep.* 363.

Lessor privileged.

It was moved that the lessor having privilege, might name a good plaintiff to be liable to costs, refused. *Preston v. Linger. Str.* 479.

It must be moved for on affidavit, and there will be a rule to shew cause granted.

If a justice of the one bench or the other be concerned, the trial shall be at bar upon motion without affidavit. 1 *Sid.* 407.

The particular value or difficulty must be shewn, for it is not enough to swear generally, that there is value or difficulty therein. Either party may move *Special jury*, for a special jury, give brief to counsel for that purpose, which is done on a slip of paper, and signed by him; pay 10s. 6d. carry it to the clerk of the rules, who draws it up; pay 6s. get appointment thereon at the master's, serve copy rule and appointment on the opposite attorney, the like on the deputy secondary, or sheriff (if in *Middlesex*, or in any other county), who will attend the master with the book, and be in presence of both, names thereout forty-eight; pay him 2l. 2s. sheriff 2l. 2s. when this is done, the master's clerk makes out the list of the forty-eight; pay him 2s. 6d. then get appointment from the master, to strike out twelve on each side; serve copy of rule, and appointment on opposite attorney (the sheriff having nothing further to do), attend the master, and name on each side, one by one, the persons to be struck out; the plaintiff strikes first: this being done, the clerk makes a copy of the remaining twenty-four, pay 2s. 6d. each side, which is to be returned to try the *issue*, a special *distingas* issuing for that purpose, which is made out by the plaintiff.

The plaintiff may countermand notice of trial, *May counter-* though it be a trial at bar (which is always appoint- *mano.* ed by the court), and prevent the cause being tried at the day, nor can it be brought to trial, unless some day be appointed again by the court. *N. on R. M. 4 Ann.* The cause is set down with Mr. *Austin*, and the record delivered to him.

Special Jury.

How to apply for
a special jury.

GIVE brief to counsel, with the name of the cause, and indorse thereon, "*To move for a special jury;*" (fee 10s. 6d.) he will sign it; carry it to the clerk of the rules, and he will draw up rule (pay him 6s.); get an appointment thereon from the master to nominate the forty-eight, serve copy on the attorney of the other side, and the sheriff also must be served; attend master, and he will nominate the forty-eight (pay master 2l. 2s. sheriff 2l. 2s.); when this is done, master's clerk makes out copies for each party (pay him 2s. 6d.). When you are ready to strike, then apply to the master for another appointment; serve copy of rule, and that appointment on the attorney; attend the master again, and he will strike out twelve on each side, beginning with the plaintiff first; the clerk then makes copies (pay 2s. 6d. each), which reduces them to twenty-four, to try the issue, and a special writ of *disfringas juratorum* issues for that purpose. The master says, though the jury be at the instance of the defendant, yet the plaintiff is bound to sue out the *disfringas*, and summon the jury.

Cannot strike *ex parte*, till the third appointment.

No costs of a special jury shall be allowed, unless the judge certify in court.

None to take more than one guinea, except

" The person or party, who shall apply for a special jury, shall not only bear and pay the fees for striking such jury, but shall also pay and discharge all the expences occasioned by the trial of the cause by such special jury; and shall not have any farther or other allowance for the same upon taxation of costs, than such person, or the party, would be entitled unto, in case the cause had been tried by a common jury, unless the judge, before whom the cause is tried, shall, immediately after the trial, certify *in open court* under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury." *Stat. 24 Geo. 2. c. 18.*

No person who shall serve upon a special jury, or be returned, shall be allowed to take for such serving on

on any such jury, more than the judge who tries the cause shall think just and reasonable, not exceeding 12. 12. (except in causes wherein a view hath been directed). *Same Stat.* where there is, a view.

Jury was nominated in *Mich.* term, but the twenty-four had not been struck out by the parties. In *Hil.* term appointments were made out, and defendant's attorney (though he attended) refused to strike, because the jury were nominated in *Mich.* term. Lord *Mansfield* was clear the master ought to do it, without any direction from the court; and said, it was right for him to act as usual, unless there should appear any particular reason to the contrary: In the present case, there had been no change of sheriffs, which Lord *Mansfield* observed had been given as a reason why the same jury should not serve for the trial of the cause, which had been already struck for a former intended trial. But he said he did not see the reason why the change of the sheriffs should make any difference. Mr. *Wallace* said, the court of *C. P.* had lately determined it should be so, and that the change of sheriffs makes no difference. Lord *Mansfield* said he was glad of it. *Cowp. Rep.* 412. *Rex v. Hart.* *N. B.* This is now the established practice. The change of sheriffs makes no difference if the jury be once nominated.

View.

FORMERLY there could not have been a *view* in personal actions, but upon withdrawing of a juror after they were sworn, and consent of the parties by a rule of court. Now by the act 4 & 5 *Ann. c.* 16. *s.* 8. it may be granted in any action brought in the courts at *Westminster*, where necessary, the better to understand the evidence upon the trial; in which case the courts may order special writs of *distringas*, or *habeas corpora*, to the sheriff, requiring him to have six of the jurors, or a greater number of them, at the place in question some convenient time before the trial; who shall have View may be granted in any action where necessary.

have the matter shewn to them by two persons named in the writ of *habeas corpora juratorum*, and appointed by the court; and the said sheriff executing the writ is especially to return the view made accordingly.

Six of the jurors,
or more, shall
have the view.

By *Stat. 3 Geo. 2. c. 25.* (the balloting act) s. 14. it is provided, "*That where a view shall be allowed, six of the jurors named in the panel, or more, shall have the view, and shall be the first sworn (or such of them as appear) before any drawing.*" But as the having a view was not by either of the statutes made a matter of course, though such a practice had prevailed, and had been abused for the purposes of delay, the court thought it their duty to take care that their ordering a view should not obstruct justice, and prevent the cause from being tried; and they resolved not to order one any more, without a full examination into the propriety and necessity of it: for they were all clearly of opinion, that the act meant that a view should not be granted, unless the court was satisfied, that it was *proper and necessary*; and they thought it better that a cause should be tried upon a view had by any six, or by fewer than six, or even without any view, than be delayed for a greater length of time: Accordingly they added a clause to the usual rule for views, purporting that the party praying a view consented "*That in case no view should be had, or if a view should be had by any of the jurors whomsoever (though not six of the first twelve), yet the trial should proceed, and no objection be made on account thereof, or for want of a proper return.*" Since which, motions for views are become motions of course without affidavit, with such additional consent annexed to them. *Vide 1 Burr. Rep. 256, 257.*

How to obtain
rule.

In this court a counsel's hand is sufficient for a view in term time, fee 10s. 6d. take the brief to the clerk of the rules, who will draw up same, 10s.; but first apply to the opposite attorney for the name of his shewer, and place of abode, and have your's ready; so that the rule may be properly filled up.

and also the day and place where the jurors are to meet must be inserted. When you have drawn up the rule, serve copy on the opposite attorney, leave the original, with the names of the jurors (if special) with the sheriff; if common, he has them, and he will summon the jury; pay him 2*l.* 2*s.*; his fee for attendance 1*l.* 1*s.*; and no evidence is to be given on the view, but the premises only are to be shewn. In town it is not usual to treat the jury, as heretofore, with dinners, but in the country it is, and at the expence of both parties. *N. B.* In vacation, by consent, you may have a judge's order for a view, upon producing counsel's hand, fee 10*s.* 6*d.*

The shewers may shew marks, boundaries, &c. Shewers may enlighten the viewers, and may say to them, these shew marks, &c. are the places which on the trial we shall adapt our evidence.

Record of *Nisi Prius*.

THIS contains the whole pleadings, and is to be ingrossed fairly on a double half-crown Rampt parchment, and made up by the attornies themselves. In every record to be made up, there must be two *placitas*, the one preceding the *issue*, which is to be of that term the *issue* is joined, the other, the term the cause is to be tried. If the *issue* and record be made up the same term, then the two *placitas* are to be of that term.

If on a plea in abatement, a *respondeas ouster* is awarded, and afterwards the defendant pleads in chief, and there is a verdict for the plaintiff, yet the plea must be entered on the *nisi prius* record, or it is good cause for judgment to be arrested; for as it must be entered on the plea roll (which is in court), so it must be mentioned on the *nisi prius* record, otherwise it will not appear to have been a verdict in the same cause. Lord Raym. 329.

If there be a *demurrer* to any of the pleadings, and the cause is to be tried before or after that be disposed of, all the proceedings must be entered on

All pleadings in the cause to be entered on the record.

So if there is a demurrer.

the *nisi prius* record, the same as made up in the paper book.

Where two partners plead.

Assumpsit against two, they sever in pleading. One pleaded bankruptcy, on which issue was joined. The other pleaded a judgment recovered against him and the other defendant. There was a *nolle prosequi* entered, not to proceed further against the bankrupt, and plaintiff proceeded to final judgment against the other. On error being brought, the judgment was affirmed. *Noke & Chiswell v. Ingham*, 1 *Wils.* 89.

When a *ninpros* may be entered against one.

Where there are several defendants, and they sever in plea, whereupon issue is joined, the plaintiff may enter a *nolle prosequi* as to one defendant at any time before the record is sent down to be tried at *nisi prius*. 2 *Roll. Abr.* 100. *Salk.* 457.

Record.

Pleas before our lord the king, at Westminster, of the term of the holy Trinity in the 31st year of the reign of our sovereign Lord George the third, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and in the year of our Lord 1791.

Roll 520.

Sto. mont and Way.

London, } Be it remembered, that on
to wit. } (to the end of the *issue* verbatim); then
enter a second *placita* as follows :

Second *placita*.

Pleas before our lord the king at Westminster, of the term of St. Michael, in the 32d year of the reign of our sovereign Lord George the third, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and in the year of our Lord 1791.

Jurata for London.

London, } The jury between John Jones, by his
to wit. } attorney, plaintiff, and Edward Pouis,

^a Or debt, as the action is.

defendant, of a plea of trespass on the case^a, is respited before our lord the king, at Westminster,

^b The return of the *distingas*.

until next after ^b, unless the right honourable Lloyd lord Kenyon, his majesty's chief justice,

^c The day of trial.

assigned to hold pleas before the king himself, shall first come on^c the day of , at the Guildhall of the said city, according to the form of the statute in such case made and provided, for default of the jurors, because none of them did appear; therefore let the sheriff have the bodies of the said jurors, to make

make the said jury between the parties aforesaid, of the plea aforesaid; accordingly, the same day is given to the parties aforesaid, at the same place.

If the cause is to be tried in *Middlesex*, say, If in *Middlesex*,
 " unless, &c. shall first come on the
 " day of at Westminster-hall, in
 " the county of Middlesex."

If at the assizes, " unless his majesty's justices If at assizes,
 " assigned to take the assizes in and for the county of
 " Oxford, shall first come on the day
 " of July at Oxford, in the said county, according,
 " &c." and at the end of the jurata add, " And
 " be it known, that the king's writ on record, was
 " delivered to the deputy sheriff of the said county, on
 " the day of in this same term, before our d The last day of
 " lord the king, at Westminster, to be executed ac- term your last
 " cording to law, at his peril." placita is of.

" It is ordered, that unless the causes to be tried at To be entered in
 " London and Middlesex be entered with the chief town two days
 " justice of this court by the space of two days before before sittings.
 " the sittings upon which such causes are to be tried,
 " the marshal may enter a ne recipiatur, at the re-
 " quest of the defendant or his attorney." R. H.
 15 & 16 Car. 2.

In *Middlesex* no record of *nisi prius* will be re- No record to be
 ceived at any sitting after term, unless the same shall received in Mid-
 be delivered to, and entered with the marshal, within dlesex for sitting
 two days after the last day of every term. Notice after term, unless
 M. 17 Geo. 2. entered two days
 after last day of
 term.

And in *London* no record of *nisi prius* will be re- In London the
 ceived at any sitting after term, unless the same shall day before ad-
 be delivered to, and entered with the marshal, the day journalment-day.
 before the day to which the sittings in London shall be
 adjourned, by nine in the evening. Ibid.

It is ordered, that no cause for the future be tried by New rule setting
 a special jury, unless the rule for such special jury be down causes
 drawn up, and the cause marked as a special jury in the where there is a
 marshal's book of causes, before the adjournment day special jury.
 after each term. By the court. R. Trin. Term,
 30 Geo. 3. 1790.

Every

Every cause to be tried in the order they stand, unless, &c.

Every cause to be tried at *nisi prius*, in *London* and *Middlesex*, shall be tried in the order in which it is entered (beginning with *remanets*), unless it shall be made out to the satisfaction of the judge of *nisi prius* in open court, that there is a reasonable cause to the contrary, who thereupon will make such order for the trial of the cause so to be put off, as to him shall seem just. *R. Mich. 17 Geo. 2.*

If the plaintiff be hindered of a trial by a *ne recipiatur*, may try the cause at the next sittings, on notice.

It is ordered, that if the defendant in any action in *London* or *Middlesex*, and to be tried at the sittings of the lord chief justice of this court, shall enter a *ne recipiatur*, and by reason thereof hinder the plaintiff that he cannot proceed at that sitting, that then it shall be lawful to the said plaintiff to proceed to trial in the said cause at the next sitting of the said chief justice, after the entering of the said *ne recipiatur*, upon notice given during the said first sittings. *R. Mich. 4 Ann.*

When may enter a *ne recipiatur*.

But if a cause is to be tried at the sittings after term, no *ne recipiatur* can be entered, until after proclamation made by order of the chief justice for bringing in the records; and then if the record be not brought in, the defendant's attorney may enter a *ne recipiatur*. *N. on the above rule.*

Remanet.

Likewise if notice of trial be given for a day certain in *London* or *Middlesex*, and the plaintiff is not ready to proceed, the cause may be tried the next sitting, upon the like notice as when a *ne recipiatur* is entered by the defendant; and in either case, if the cause be not tried at such next sitting, notice is to be given as at first, unless it be made a *remanet*, and then new notice of trial is never given; for the defendant is bound to attend till the cause be tried. *N. on R. M. 4 Ann.*

Remanet how to be made.

If the cause is not tried the day of the sitting, it is then made a *remanet* by the marshal of course; he alters the *jurata*, pay him 5s. get the *distringat*, alter the return to the day of the next sitting (if it be a proper return day), if not, the next day, recalc it, pay 1s. annex it to the record again, as there is no

no occasion for the sheriff to return a new panel, nor is there occasion for a new stamp.

Care ought to be taken respecting this, for the *jurata* must be altered, if not altered, is not amendable, and the trial altered. will be *coram non judice*; but the court will order a *venire facias de novo*. 1 *Wils.* 144. *Crowder v. Rooke*.

When the record is ingrossed, make an *incipitur* on a roll (which get of Mr. *Webb*, or Mr. *Adams*), first entering thereon the term the issue is joined, warrants of attorney for plaintiff and defendant, and part of the memorandum of the issue; take the issue and record to the clerk of the judgments, who enters the issue, marks the roll, record, and issue paper, pay him 3s. 6d. for the first ten sheets, and 1s. for six more; if the issue should be of an old term, and your entries have not been made before, first get number-roll of Mr. *Edge* of the term issue is joined, then make out a docket for the entry, and docket same; take record to Mr. *Way*'s office, *King's Bench Walks*, who will pass same, pay 7s. 6d. for the first eight sheets, and 7s. for every other eight, and 6d. to the sealer.

How to enter the issue, and pass the record in town.

If at the assizes, the issue is entered the same as before, and record is passed at the same office (Mr. *Way*'s) with the clerk of the circuit in which the cause is to be tried; get the *venire* returned in town with the under-sheriff, pay him 2s. 6d. send the *distringas* and *venire* into the country annexed to the record, and the writ and record are to be entered together, and left with the judge's marshal, pay 14s. 8d. *Vide R. 10 & 11 Geo. 2.*

How to proceed at the assizes.

It is ordered, that no writ and record of *nisi prius* shall be received at the assizes in any county in England, unless they shall be delivered to be entered with the marshal before the first sitting of the court after the commission day (except in the counties of *York* and *Norfolk*), and there the writs and records shall be delivered to, and entered with the marshal, before the first sitting of the court, on the second day after the commission day, otherwise they shall not be received,

Entry of record at assizes.

received, and the causes shall be tried in the order in which they shall be so entered (except they be put off by the judge); and a list of the causes shall be made by the marshal, and fixed up in some public place in the *nisi prius* court, and to remain the whole time of the assizes. *R. H. 14 Geo. 2.*

Variation.

If the record of *nisi prius* agree with the declaration delivered, a variation from the issue delivered is not material. *Str. 1131. 2 Wils. 160.* For defendant's attorney should have refused the issue, if not agreeable to the declaration.

Venire and Distringas.

THEN sue out *venire* and *distringas* (both of which are sealed only), get the *distringas* returned at the sheriff's office, pay in *Middlesex* 14s. 8d. in *London*, if common, 4s. 4d. if special 8s. 8d. and annex it to the record with the panel.

Venire facias.

George the third, &c. to the sheriff, &c. greeting. We command you that you cause to come before us, at *Westminster*, on

next after

(here insert some return-day before

the trial, if a country cause the last day of the term), twelve free and lawful men of the body of your county, each of whom having 10l. a year at the least, of lands, tenements or rents, by whom the truth of the matter may be the better known, and who are in no-wise a-kin either to *A. B.* the plaintiff, or to *C. D.* the defendant, to make a certain jury of the county between the parties aforesaid, in a plea of trespass on the case (or as the case may be), because as well the said *C. D.* as the said *A. B.* between whom the contention thereupon is, have put themselves upon that jury; and have there then the names of the jurors, and this writ. Witness, *Lloyd lord Kenyon*, at *Westminster* (the first day of the term in which the cause is to be tried), in the 32d year of our reign.

Stormont and Way.

In

In case one of the defendants suffers judgment to go by default, and the other pleads to issue, after the words, "to make a jury of the county between the parties aforesaid," add these, "as well to try the issue between the said *A. B.* and *C. D.* joined, of a plea of trespass on the case, as to inquire what damages the said *A.* hath sustained by reason of the not performing the said promises and undertakings by the said *R.* made, as for his costs and charges by him sustained in this behalf, whereof it is considered, that the said *A.* ought to recover his damages, because as well the said *R.* as the said *A.* between whom the contention thereupon is, have put themselves upon that jury; and have there then the names, &c."

If where judgment goes by default against one and an issue as to the other defendant.

If there are two sheriffs, and one is interested in the cause, or related to either of the parties, the venire should be awarded to the other only; or if both are interested, then to the coroner of the county.

If sheriffs are parties, the coroner to return venire.

George the third, &c. To the sheriff of, &c. Common distringas. greeting: We command you that you distrain the several persons named in the panel annexed to this writ; the jury summoned in our court before us, between *A. B.* plaintiff, and *C. D.* defendant, by all their lands and chattels in your bailiwick, so that neither they, nor any for them, intermeddle therewith, until you shall have other command in that behalf from us; and that you answer us for the issues of the same, so that you have their bodies before us at *Westminster*, on next after (here insert the first return-day after the trial), or before our right trusty and well-beloved *Lloyd* lord *Kenyon*, our chief justice, assigned to hold pleas in our court before us, if he shall first come on (the day of trial); if in *London*, say, at the Guildhall of the city of *London* aforesaid; if in *Middlesex*, say, "at *Westminster-hall* in the county of *Middlesex*;" if at the assizes, say, "before our justices assigned to hold the assizes in your county, if they

Return of the
venue.

" they shall first come on" (the day of trial) at
(the place where held) in your county, according to
the form of the statute in that case lately made and
provided, to make a certain jury between the said
parties, of a plea of trespass on the case (as the
action is), and to hear thereof their judgment of
many defaults, and that you have there the names
of the jurors and this writ. Witness Lloyd lord
Kenyon, at Westminster, the day of
in the 32d year of our reign.

Stormont and Way.

Distringas for a
special jury.
2s. 6d. stamp.

View.

George, &c. to the sheriffs of London, greeting:
We command you, that you distrain John Ling, of
Coleman-street. Joseph Lancaster, of Queen-street,
and so on, till you come to the end of the master's
list, then add (merchants), the jury summoned in
our court before us (as in a common one); and if
there is a view after the word (default) add this,
" And in the mean time, according to the form of
" the statute in such case made and provided, we
" command you, that you have six of the first 12
" of the said jurors, or as many more of them as
" you shall think fit, to take a view of the place in
" question, on the day of and that the said
" jurors meet on the same day, at the house of
" (as in the rule) in your city, and proceed
" from thence to view the said place in the pre-
" sence of T. B. on the part of the plaintiff, and
" G. H. on the part of the defendant, appointed by
" our court before us, to shew the said place to such of
" the said jurors as shall come to view the same; and
" that you make appear to us at Westminster, on
" the said day, in what manner you shall have exe-
" cuted this our precept, and that you have then there
" this writ. Witness, &c."

Subpœna.

If you have witnesses, and they will not appear,
make out a subpœna, as follows:

George

George the third, &c. To John Doe, Richard Subpœna to Roe, &c. (you may put four in a writ) greeting: *testify.*
 We command you, that, all excuses being laid *2s. 6d. stamp.*
 aside, you, and every one of you be, in your proper persons, before our right trusty and well beloved Lloyd lord Kenyon, our chief justice, assigned to hold pleas in our court before us, at the Guildhall of the city of London, or, "at Westminster-hall in the county of Middlesex" (if in Middlesex): (if at the assizes say, "before our justices, assigned to hold the assizes in and for the county of) on the day of at "in the said county," by of the clock in the forenoon of the same day, to testify all and singular what you, or either of you know, in a certain cause now depending, undetermined in our court before us, between A. B. plaintiff, and C. D. defendant, of a plea of trespass on the case (*as the action is*) on the part of the plaintiff, and at that day to be tried by a jury of the county; and this you, nor any of you, are by no means to omit, under the penalty upon each of you of 100l. Witness, Lloyd lord Kenyon, &c.

Stormont and Way.

Teste the Subpœna the last day of term.

Middlesex subpœna, to testify between A. B. Præcipe for plaintiff, and C. D. defendant, on the part of the *subpœna.*
 plaintiff. To be signed by Mr. Webb, pay 1s. 8d. and 7d. seal; serve each witness with a copy; pay 1s. in town; if in the country, the party must have his expences tendered him, and that reasonable,
 2 Stra. 1150. Chapman v. Poynton.

If any person has in his possession any writings, *Subpœna duces*
deeds, books of account, or other things, which may recum, when ne-
 be necessary to produce at the trial, he should be *cessary.*
 served with a *subpœna duces tecum*; but if the plaintiff or defendant are to produce, or the attornies, then a notice to them will be sufficient.

"George, &c." as in the former one, as far as *Subpœna duces*
 the place of trial, then say, And that you bring *recum, 2s. 6d.*
 with you and produce at the time and place afore- *stamp.*
 said a deed of assignment, bearing date (describe
 the

the thing to be produced), and then and there to testify and shew all and singular those things which you or either of you know, or the said deed or instrument doth import, of and concerning a certain action now in our court before us depending between, &c. (as in the former one); it is signed with Mr. *Webb*, and sealed.

If he is in
prison.

If a witness should be detained in prison, the following *habeas corpus* may be had, to bring him into court as an evidence, on leaving which, the gaoler must bring him up; ingross it on a 5s. stamp parchment.

*Habeas corpus ad
testificandum.*

George the third, &c. To the marshal of our prison of the *Marshalsea*, greeting (or to the person in whose custody he is): We command you, that the body of *John Wall*, in our prison, under your custody as it is said, detained under safe and secure conduct, by whatsoever name the said *John Wall* may be called in the same, you have before our right trusty and well beloved *Lloyd lord Kenyon*, our chief justice, assigned to hold pleas in our court before us at *Westminster-hall*, in the county of *Middlesex*, "or at *Guildhall* in the city of *London*;" (if at the assizes) "before our justices assigned to hold the assizes in and for the county of *Oxford*, on Monday the day of next, at *Oxford* in the said county," by nine of the clock in the forenoon of the same day, there to testify the truth, according to his knowledge, in a certain cause now depending in our court before us, and then and there to be tried between *A. B.* plaintiff, and *C. D.* defendant, in a plea of trespass and assault (as the action is); on the part of the plaintiff, and immediately after the said *John Wall* shall then and there have given his testimony before the said chief justice (if in town), if in the country, "before our said justices," to return him, the said *John Wall*, to our said prison, under safe and secure conduct; and have you there then this writ. Witnesses *Lloyd lord Kenyon*, at *Westminster*, &c.

S:ormont and Way.

A pra-

A *præcipe*, as before, is made; sign it with Mr. Webb, 1s. 8d.; seal 7d. but you must first get a judge's *fiat* thereon, upon an affidavit made by the party who applies, "that he is a material witness on his part, and cannot proceed to the trial without his testimony." 4 Burr. 1440. Then sign and seal the same, and leave it either with the marshal or gaoler, in whose custody the witness is, for his return, and he will bring up the witness to the court.

N. B. See more particulars under *title Ha. Corp.* and when this writ can or cannot be had of course.

Witnesses ought to have a reasonable time to put their own affairs in such order, that their attendance upon the court may be of as little prejudice to themselves as possible; and this court held that notice at two in the afternoon in the city, to attend the sittings that evening at *Westminster*, was too short a time. Str. 510. *Hammond v. Stewart*.

Witnesses to have a reasonable time.

The court will not grant an attachment against a witness, if he was not personally served; without personal service, it is not sufficient to warrant a proceeding criminally against him, whatever it might do in an action. Str. 1054. *Smalt v. Whitmill*.

If the witness comes a distance off, there ought to be a tender of reasonable charges. *Ibid*.

Examining Witnesses on Interrogatories before a Judge.

If after issue is delivered, and notice of trial given, a witness that is material on either side is going abroad, or beyond sea, so that he cannot be had at the trial, the party who wishes for him, may apply to the court for a rule, that he may be examined as a witness, before one of the justices of this court, but he cannot be examined without consent; but the court may stay the proceedings: it is a rule to shew cause, and the motion is made upon affidavit "of his being material on the part he is to be examined,"

Z

"mined,

"mined, without whose testimony you cannot proceed to the trial, and that he is going to Scotland, Ireland, or out of the kingdom, on such a day;" counsel's fee is 10s. 6d. for the rule to shew cause, and one guinea to make it absolute; rule 2s. per sheet; serve it on the attorney on the other side; make affidavit of the service, and if consented to, the rule will be made absolute. Notice must be given, and a copy of the interrogatories delivered to the opposite attorney of the time he is to be examined, so that the other party may be at liberty to file interrogatories, and cross-examine him on his part.

In vacation, a judge's summons.

If it is in vacation, application must be made in a summary way; get a summons from a judge, to shew cause why *A. B.* a material witness, may not be examined, on the part of the plaintiff, on interrogatories, and upon producing the like affidavit as before, and consented to, the order will be granted.

When court will assist.

If a party refuse to consent to the examination of a witness to an essential fact by commission, when his presence cannot be compelled, or to admit the fact, the court will assist the other party by putting off the trial. *Doug. Rep.* 420. *Furly v. Newnham.*

When depositions may be read.

If a witness not likely to be had at the trial be examined before a judge, and cross-examined by the other party, and his deposition put in writing, yet if at the trial it be proved, that the party might have him there, his depositions are not to be read. *12 Mod.* 493.

Court may put off the trial from time to time.

If a party wants the testimony of witnesses whom he cannot compel to attend, the court may put off the trial from time to time, until the other party consents that depositions shall be taken where they are. *Moslyn v. Fabrigas. Cowp. Rep.* 174.

Where to take witness.

The witness is to be taken to the judge's clerk, who examines him, and the interrogatories are to be left there, and he is to be sworn upon them; after he is examined on both sides, the judge's clerk will deliver out copies of the depositions. The in-

terrogatories

terrogatories are to be signed by counsel, for which you pay him one guinea; ingross them on a double 12d. stamp parchment.

*“ Interrogatories to be administered to John Denn, ^{The form of}
 “ a witness to be produced, sworn and examined, on ^{interrogatories.}
 “ the part and behalf of A. B. plaintiff, against
 “ C. D. defendant, before Sir Francis Buller, baronet,
 “ one of the justices of the court of our lord the king,
 “ before the king himself, pursuant to a rule of the
 “ said court, made on Wednesday next after fifteen
 “ days of Saint Martin, in the 32d year of the reign
 “ of his majesty king George the third; or if it is
 “ an order lay, (pursuant to an order of the said
 “ justice of our said lord the king, made the
 “ day of 1791).”*

Do you know the parties, plaintiff and defend- *Imprimis.*
 ant, in the title of these interrogatories named, or
 either, and which of them, and how long have you
 known them, either, and which of them? declare
 the truth, and your knowledge herein.

Look upon the deed or writing now produced and ^{Secondly.}
 shewn to you at this the time of your examina-
 tion, marked with the letter A. and purporting to
 be, &c. was such deed or writing sealed and de-
 livered in your presence, and by whom? Were
 you a subscribing witness to the sealing and deliver-
 ing thereof? And is your name indorsed and set as
 a witness thereto of your own hand-writing? And
 do you know the hand writing of the other wit-
 nesses or witnesses thereto? And is or are the name
 or names of such witness or witnesses of the
 proper hand-writing of such witness or witnesses?
 And did you see them set any, and which of their
 names as subscribing witness or witnesses thereunto?
 Set forth the particulars at large, according to the
 best of your knowledge, remembrance, and belief,
 and the truth declare.

Lastly, Do you know of any other matter or *Last interroga-*
 thing, or have you heard, or can you say any thing *tory.*
 touching the matter in question in this cause, that
 may tend to the benefit and advantage of the
 complainant

complainant in this cause, besides what you have been interrogated unto? Declare the same fully and at large, as if you had been particularly interrogated thereto.

Interrogatories
for defendant.

J. D.
Interrogatories to be administered to *Richard Fenn*, a witness to be produced, sworn, and examined on the part and behalf of *C. D.* the defendant, at the suit of *A. B.* before, &c.

Counties Palatine.

Mittimus only
sent.

In actions brought in counties palatine, no jury process is issued out of the courts above, a mittimus of the record to the justices, there commanding them to cause a jury to be summoned to try the issue between the parties, and return the same when tried to the courts at *Westminster*, being the *only writ sued out here* on this occasion, as follows: And the record is passed at Mr. *Way's* office. in the same manner as other records are.

Mittimus to a
county palatine.

George the third, &c. To our justices of our county palatine of *Chester*, greeting: The tenor of a certain record before us at *Westminster*, between *A. B.* plaintiff, and *C. D.* defendant, in a plea of trespass on the case, we send you inclosed herein, commanding that you (having inspected the same) by our writ of our said county, do command the sheriff of the same county, that he cause twelve free and lawful men of the body of the county to come before you at your next session, after this writ shall be delivered to you, each of whom having *10l.* a year at least of lands, tenements, or rents, by whom the truth of the matter may be the better known and enquired into; and who are in no wise related either to the said *A.* or to the aforesaid *C.* to recognize and make a jury of the county between the said parties, in the plea aforesaid, because as well the said *A.* as the said *C.* between whom the controversy is, have put themselves upon that jury; and also that you make such further process against the said jurors, so to be impanelled

The *venire* and
ba. corp. are
made out by
the prothono-
tary there.

This writ is
signed with
Messrs. Provoost
and Webb, and
sealed.

impanelled between the said parties as are in this behalf used and commonly made, according to the law and custom of the said county, until the issue aforesaid between the said parties shall be fully tried; and when the verification and issue aforesaid shall be there made and tried before you, then do you send the record of the said plaint, together with every thing that shall then and there be done before you therein, and also this writ, before us at *Westminster* at a certain day which you shall appoint to the said parties, to be there to hear judgment thereupon. Witness *Lloyd lord Kenyon, &c.*
Stormont and Way.

Signing 1s. 8d.
 Seal 7d.

Brief.

THE brief is instructions to counsel, for supporting the parties case in whose behalf it is made up and delivered, for calling witnesses to prove or disprove such matters as may benefit or prejudice the client, and for properly conducting the cause through the course of the trial; and to this end it should contain the names of the parties, an abstract of the pleadings, the case truly stated, with such observations thereon as may be judged necessary and proper; and lastly, the names of the witnesses, with a short mention (as an index to the case, by way of proof) of what they respectively know in support thereof, that the counsel may not be at a loss to call the proper witness, for proof of particular facts, as may be necessary.

In this brief the names of the plaintiff and defendant are only once used, which is placed at the top of the sheet thus,

Between *John Denn*, plaintiff,
 In the King's Bench. and
Richard Fenn, defendant,
London, (fs.) The plaintiff declares, for that whereas the defendant, &c. here state the counts as short as you can to the end of the declaration: then the plea, replication, rejoinder, &c.; afterwards the case and evidence.

Z 3

For

For the benefit of the clerk I shall select a few of the general heads and leading maxims, relative to the law of evidence.

Evidence.

As in public judicatures it is necessary to search into the truth of facts as they really are, hence whatever may be exhibited to a court or jury, whether it be by matter of record or writing, or by the testimony of witnesses, in order to enable them to pronounce with certainty the truth of any matter in dispute, whether such matter relates to a person's life, liberty, or property, is called evidence.

In debt on bond or deed.

Upon an action of debt, when the defendant denies his bond by the plea of *non est factum*, and the issue is, whether it be his deed or no, the plaintiff must prove the due execution of it by the subscribing witness, or if dead, the hand-writing of the obligor and witness, as also his death.

Two kinds of evidence.

Evidence in the trial by jury is of two kinds, either *written* or *parol*, that is, by word of mouth. *Written proofs*, or evidence, are, 1. *Records*, and 2. *Ancient deeds of thirty years standing*, which prove themselves (unless erased or interlined in material matter). *Bull. 251.* But 3. *Modern deeds*, and 4. *Other writings*, must be attested and verified by parol evidence of at least one of the subscribing witnesses.

Best evidence to be given.

And the one general rule that runs through all the doctrine of trials is this, that *the best evidence the nature of the case will admit of, shall always be required, if possible to be had*; but if not possible, *then the best evidence that can be had shall be allowed.* *Carth. 220. Sho. Rep. 39.* For if it be found that there is any better evidence than is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed. Thus in order to prove a lease for years, nothing shall be admitted but the very deed itself, if in being; but if that be positively proved to be burnt or destroyed (not relying on any loose negative, as that it cannot be found, or the like), then an attested copy may be produced, or parol evidence given of its contents. *Mod. 4. Str. 401. 526. Salt.*

Salk. 287. So no evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases (as in proof of any *general customs, or matters of common tradition or repute*), the court admit of *hearsay evidence*, or an account of what persons deceased have declared in their lifetime: but such evidence will not be received of any particular facts. 1 *Mod.* 283.

But though *hearsay* be not allowed as direct evidence, yet it may be admitted in corroboration of a witness's testimony, to shew that he affirmed the same thing before on other occasions, and that he is still constant to himself. *Ibid.* So too, books of account or shop-books are not allowed of themselves to be given in evidence for the owner, after the year, by stat. 7 *Jac.* 1. c. 12. nor of themselves, within the year, without some circumstances to make it so: but a servant who made the entry may have recourse to them to refresh his memory: and if such servant (who was accustomed to make these entries) be dead, and his hand-writing proved, the book may be read in evidence. 1 *Salk.* 285. *Bull.* 276. The statute excepts accounts between merchant and merchant, in the usual intercourse of trade.

All persons, of what religion or country they may be, that have the use of their reason, are to be received and examined, except such as are infamous, &c. *Salk.* 690. *Bull.* 288. or such as are interested in the event of the cause; *Co. Lit.* 6. *Ib.* 237; but it must be a present, not a future contingent interest. 1 *Salk.* 283. 257. The husband cannot be a witness for or against the wife, nor the wife for or against her husband, because their interests are the same (unless in criminal cases). *Ibid.* Bail cannot be a witness, unless exonerated. *Str.* 436. All others are competent witnesses, though the jury, from other circumstances, judge of their credibility. *Vide Str.* 140. 1 *P. W.* 239. *Str.* 1122.

But no other relation is excluded, because not absolutely the same in interest. *Bull.* 283.

What persons
interested may
give evidence.

A party interested for the sake of trade and the common usage of business, may be a witness, as a porter in a shop, or banker's clerk. *Ibid.* 284. So a party interested where no other evidence is reasonably to be expected, as on the statute of hue and cry. *Ibid.* So where he acquires the interest by his own act after the party, who calls him as a witness, has a right to his evidence. *Ibid.* *Skin.* 586. 3 *Lev.* 132. So where the possibility of interest is very remote. 2 *Lev.* 231.

One witness.

One witness, if credible, is sufficient to a jury of any single fact, though undoubtedly the concurrence of two or more corroborates the proof. *Carib.* 144. The civil law requires two. *Show.* 158. 3 *Mod.* 283. In actions on general acts of parliament the printed statute-book is evidence; but not on private acts. There the party must have an office copy examined with the parliament-roll.

Records.

Records exemplified under the broad seal may be admitted in evidence. *Bull.* 223. But the exemplification of deeds under the broad seal cannot. *Ibid.*

Verdict.

If a verdict is to be given in evidence, an office-copy of the whole record must be made by the proper officer, examined and sworn to. *Gilb.* 25.

No verdict shall be given in evidence, but between such who are parties or privies to it, 1 *Ray.* 730.; with this restriction, that it is of a matter which was in issue in the former cause. *Hob.* 53. *Vide Carth.* 131. 2 *Str.* 1151.

Writ.

When a writ is only inducement to the action, the taking out the writ may be proved without any copy of it: but when the writ itself is the gist of the action, you must have a copy from the record. *Bull.* 230. *Vide* 1 *Ray.* 733.

Bargain and sale.

Where a deed is inrolled (pursuant to the statute), the indorsement of the inrollment is evidence without further proof. *Bull.* 225. 251. 3 *Lev.* 387. *Dougl.* 56.

Where a fine is to be proved with proclamations, the proclamations must be examined with the roll. *Ibid.* *Allen* 13. *Clay* 51. and an office-copy of it, with the proclamations indorsed, is the best.

As

As to recoveries. When you shew a modern recovery, you must prove seisin in the tenant to the *præcipe*. In an ancient recovery seisin will be presumed, especially where possession is gone agreeable to it ever since. 1 *Mod.* 117. *Vide Stat.* 14 *Geo.* 2. c. 20. *Vide 2 Str.* 1109. Recoveries.

An answer to a bill in chancery is evidence against the defendant, but the bill and answer must be read from an office-copy, sworn to be examined. The office-copies of depositions are evidence in chancery, but not at common law, without examination. *Bull.* 225. 231. 233, 234.. A decree may be given in evidence between the same parties, or any claiming under them, 2 *Mod.* 231. but cannot be read without the bill and answer. *Dougl.* 580. Bill and answer,

An affidavit made in any cause, proof of such cause depending, and that such affidavit was used by the party, would perhaps be sufficient proof of its being sworn. 1 *Show.* 397. *Qu.* If his hand-writing should not be proved. Affidavit.

The bare producing the *possea* is no evidence of the verdict, without shewing a copy of the final judgment; because it may happen the judgment was arrested, or a new trial granted. But it is good evidence, that a trial was had between the same parties, so as to introduce an account of what a witness swore at that trial, who is since dead. *Pratt C. J. Str.* 162. *Pitton v. Walter.* *Possea.*

Probate of a will or letters of administration under seal is good evidence as to the personal estate. *Bull.* 242. *Vide Ray.* 405. 1 *Sid.* 359. Probate, &c.

The rolls of a court baron are evidence; for they are the public rolls by which the inheritance of every tenant is preserved. *Bull.* 243. Rolls of court baron.

The register of christenings, marriages, and burials, is good, or the copy of it, copied exactly, and examined from the original. *Ibid.* *Gro. Eliz.* 411. Register.

A copy of the admission to a copyhold estate is good evidence, 2 *Barn.* 406. examined by the court rolls. Admission.

In

General character.

In all cases where a general character or behavior is put in issue, evidence of particular facts may be admitted; but not where it comes in collaterally. *Bull.* 291.

Ambiguitas verborum latens verificatione suppletur, nam quod ex facto oritur ambiguum verificatione facti tollitur.

In every issue the affirmative is to be proved; but when so proved, the other side may contest it with opposite proofs. But to this rule there is an exception of such cases, where the law presumes the affirmative contained in the issue. *Bull.* 293.

That no evidence need be given of what is agreed by the pleadings. *Ibid.*

That whensoever a man cannot have advantage of the special matter by pleading, he may give it in evidence on the general issue. 2 *Roll. Ab.* 682. *Co. Lit.* 283. 1 *Jen.* 240.

Substance of the issue.

If the substance of the issue be proved, it is sufficient. *Co. Lit.* 282. *Hob.* 53. 55. 2 *Roll.* 706.

Modo et forma.

Where the issue is joined on the point of the action, there *modo et forma* is mere form; and need not be proved. *Co. Lit.* 281. But when a collateral point in pleading is traversed, then *modo et forma* is of the substance of the issue, and must be proved. *Ibid.*

Ejectment.

If brief is in an ejectment cause, follow these rules:
1. Begin with the person seised in fee of the premises under whom the lessor of the plaintiff claims, deduce the title from such person so seized, setting forth the dates and contents of the conveyances, and state how they are executed, whether by livery of seisin, or by enrolment, by lease and release, or by fine and deed of uses, if in by purchase prove the deed.

If witnesses are dead, prove they are so, and the hand writing, with that of the grantor. If not an old title, prove the person seised and in possession, under whom you claim.

If claim by will.

2. Though the common way is to call but one witness to prove the will, yet that is only where there is no objection made by the heir; for he is intitled to

to have them *all examined*, but then he must produce them; for the devisee need produce only one, if that one prove all the requisites. *Buller's Nisi Prius*, 264.

In *Townsend v. Ives*, 1 *Wils.* 216, his honor said, that *all the witnesses*, if living, must be examined to prove the will; and therefore refused to establish the will: the heir at law in this case was an infant. *In Canc.*

3. If plaintiff is in by descent, prove the ancestor Descent.
seised in fee under whom you claim, set forth and prove your pedigree, which is generally put in the brief, that counsel may comprehend it without perplexity: also set forth defendant's title so far as you have knowledge, with observations.

Postea.

WHEN the cause is tried at the sittings in *London* or *Middlesex*, the associate delivers the party for whom the verdict has been given, the record, and he afterwards indorses the *postea* from the associate's minute on the panel.

The court fees are about 2*l.* 18*s.* 6*d.* for the plaintiff's verdict, on a nonsuit about 2*l.* 1*s.* defence 1*l.* 18*s.* If the cause is tried at the assizes, the associate keeps the record till the next term; and he indorses the *postea*; his fee is received for this at the trial.

Upon the return day of the *disfringas*, give a rule Rule for judgment.
for judgment on the *postea*, which enter at the clerk's office of the rules, and is given on a slip of paper thus:
A. B. against C. D. "Rule for judgment on *postea*," pay 1*s.* 10*d.* this is a *four day* rule in *full term* (and *Sunday* or any *holiday* on which the court does not sit, are not to be accounted), and in case the rule be entered on the last day of term, or after, then *Sunday* is no day. At the expiration of *four days exclusive* after entering such rule, judgment may be entered. *N. on R. E.* 5 *Geo.* 2. Within which four days,

days, the party against whom the verdict passed may move the court in *arrest* of judgment, or for a new trial; if neither of these be done, stamp the *postea* with a double 2s. 6d. get the *postea* marked *deliberatur*, with Mr. *Walter*, clerk of the common bails, pay him 6d. then take same to the master, who will tax the costs *de incremento*, and sign final judgment, then take out execution.

Death of either party.

But if either of the parties die, execution cannot be taken out upon the judgment, till a *sci. fa.* sued out, and judgment thereupon obtained. *Stat. 8 & 9 W. 3. c. 10.*

May move for new trial, &c.

No judgment given either for plaintiff or defendant upon a writ of *nisi prius* or *inquiry*, can be entered until the expiration of *four days*, exclusive of the entry of a rule for judgment, during which four days the party may move for a new trial, or in arrest of judgment. *N. on R. E. 5 Geo. 2. Reg. 3.*

Rule ought not to be entered before day in bank.

The rule ought not to be entered before the day in bank, and is not necessary if the plaintiff be *non-suited*; for in that case judgment may be entered immediately after the day in bank. *N. on R. E. 5 Geo. 2. Reg. 3.*

If by original on return day of *disfringas*.

If the action be by original, the rule may be given on the return day of the *disfringas* (if it does not happen on a *Sunday*).

Bankrupt.

If plaintiff become bankrupt between interlocutory and final judgment, yet final judgment may be entered in the name of the plaintiff, but execution cannot issue without a *scire facias*. *2 Wils. 358.*

Taxing Costs.

If you have extra costs, an affidavit of expences is necessary to be made before you tax them: in country causes, affidavits are generally made, and if sworn there, must be filed with the clerk of the rules first, who makes a copy for the master, pay him 8d. *per sheet* besides duty.

It is usual, amongst fair practisers, to give the opposite side notice of taxing costs, without a rule; but if not, he may apply to the clerk of the rules for one to be present, pay 4s. 6d. serve copy on the attorney of the other side; he cannot tax them without notice, if there be a rule. Rule to be present.

In the *King's Bench*.

A. B. plaintiff, and *C. D.* defendant.

A. B. of, &c. the plaintiff in this cause, and *E. B.* of, &c. attorney for the above named plaintiff, severally make oath, and say, and first this deponent *E. B.* for himself saith, That notice of trial was given in this cause for the last assizes to be holden at *Oxford*, that he did cause three subpoenas to be issued out on the part of the said plaintiff; and that *A. L.* of, &c. *C. L.* of, &c. *E. T.* of, &c. *G. H.* of, &c. *J. K.* of, &c. (here insert the names of the witnesses, and their places of abode, with their addition of trade, &c.) were all of them severally subpoena'd on the part of the plaintiff, and that the place of residence of the said *A. L.*, *C. L.*, and *G. H.* is distant from this deponent twelve miles: And this deponent further saith, That all the said witnesses were material and necessary for the said plaintiff; and that the said *A. L.*, &c. were all paid with their subpoena's 1s. each, and that the said *A. L.* &c. (here again name the witnesses) were necessarily absent from their places of abode in going to and returning from the said assizes three days; and this deponent was also necessarily absent from his place of abode three days, and that the usual place of abode of the said *A. L.* is distant from *Oxford* thirty-seven miles; that the usual place of abode of the said *C. L.* is distant from *Oxford* afore-said ten miles (go on here and shew the distance of every witness from the assize town): And this deponent further saith, That the said *A. L.* was very old and infirm, and that he was obliged to hire a post-chaise for her, from her place of abode to the said assizes, and back again (the said *A. L.* not being able to travel in any other way), and that he Affidavit to increase the costs.
did

The brief ought
to be produced
to the master.

did pay for the same the sum of 5*l.* 10*s.* and that he did also pay to her for her loss of time, trouble, and expence, the sum of 4*l.* 4*s.* : And this deponent further saith, That he did pay to the said C. L., E. T., G. H., &c. for their loss of time, trouble, and expence, the sum of 3*l.* 10*s.* And this deponent further saith, That his brief consisted of five sheets of paper, and that he did pay to Mr. Bearcroft with his brief and clerk, 4*l.* 6*s.* 6*d.* and to Mr. Baldwin and his clerk 2*l.* 4*s.* 6*d.* and the following court fees; to the marshal for entering the cause 18*s.* to the jury, tipstaff, and bailiff, 14*s.* to the marshal and cryer, 17*s.* and to the associate, 1*l.* 15*s.* 6*d.*; and this deponent A. B. for himself saith, that he did pay for the expence of himself and witnesses pending the said trial, the sum of 5*l.* 10*s.* 6*d.*

Sworn, &c.

It is impossible to form a general precedent for an affidavit of increased costs, as every cause varies so much in expence and circumstances, therefore you have nothing more to do than state the facts, but it must be *with certainty*, as the master cannot ascertain the expences of the witnesses without; and with that you are to shew, "*that every thing is necessary and material as far as your belief goes, to be produced on the part of your client; and the place of abode of your witnesses must also be shewn, with their distance from the place where the assizes are held,*" otherwise they cannot be allowed for.

Verdict.

A VERDICT, *vere dictum*, is either *privy* or *public*. A *privy verdict* is when the judge hath left or adjourned the court; and the jury being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court: which privy verdict is of no force, unless afterwards affirmed by a public verdict given openly in court,

court, wherein the jury may, if they please, vary from their verdict; so that the privy verdict is indeed a mere nullity, and yet it is a dangerous practice, allowing time for the parties to tamper with the jury, and therefore very seldom indulged. But the only effectual and legal verdict is the public verdict, in which they openly declare to have found the issue for the plaintiff, or for the defendant; and if for the plaintiff, they assess the damages also sustained by the plaintiff in consequence of the injury upon which the action is brought.

N. B. If the judge hath adjourned to his own lodgings, and there receive the verdict, it is a public and not a privy verdict. *Co. Lit.* 227.

Special Verdict.

SOMETIMES if there arises in the case, any difficult Special verdict, matter of law, the jury, for the sake of better information, and to avoid the danger of having their verdict attainted, will find a *special verdict*, which is grounded on the *Stat. W. 2. 13 Ed. 1. c. 30. s. 2.* whereby it is ordained, that the justices assigned to take assizes, shall not compel the jurors to say precisely, whether it be *disseisin* or not, so that they do shew the truth of the deed, and require aid of the justices. But if they of their own head will say, that it is *disseisin*, their verdict shall be admitted at their own peril, and herein they state the naked facts as they find them to be proved, and pray the advice of the court thereon, concluding conditionally, “that if upon the whole matter the court shall be of opinion that the plaintiff had cause of action, they then find for the plaintiff: if otherwise, then for the defendant.”

By rule, *M. 1654. sec. 20.* In finding of special verdicts where the points are single, and not complicated, and no special conclusion, the counsel (if required) do subscribe the points in question, and agree to amend the omissions of mistakes in the
Special verdicts
counsel to sub-
scribe the points.
 mesne

mesne conveyance, according to the truth, to bring the point in question to judgment.

Deeds to be
found according
to the substance

That unnecessary finding of deeds *in hac verba*, where the question rests not upon them, but are only derivation of title, to be spared, and found *shortly* according to the substance they bear in reference to the deed, as feoffment, lease, grant, &c.

The jury must find facts, and not evidence of facts. The court can intend nothing but what is found in a special verdict. 1 *Wils.* 55. *Hob.* 262. 2 *Stra.* 1185.

How to proceed.

If there be a special verdict found, the plaintiff's attorney generally gets the same drawn and settled by his counsel, who signs the draft, and then delivered over to the opposite attorney, who gets his counsel to sign it; when both have agreed and signed it, it is then left with the clerk of the *nisi prius* to be copied for each party; the whole proceedings are then entered in form on the roll, docketted, and filed of record: then move for a *consilium*, carry *consilium paper* to the clerk of the rules, who draws up the rule for counsel to be heard, pay 4s. 6d. take same again to the clerk of the papers, who enters the cause upon producing the rule, pay 1s. serve same on the attorney for the defendant.

The *consilium* is
moved for in the
same manner as
on demurrer.

Copies of the *whole record*, and *special verdict* or case, are to be made for the judges, the same as on demurrers, and left with them *two days* before argument. Also counsel must have their briefs, with a copy of the *whole record* and *special verdict*. *Rule E. 2 Jac. 2.*

It must be set down *within the first four days of the term*, and cannot afterwards without leave.

Be the verdict in whose favour it may, the rule of court is drawn up, and costs taxed immediately, without a rule being given for judgment, and execution may issue thereon. But the other party may have a rule to be present at the taxing of costs, the same as in other cases.

Special

Special Case.

ANOTHER method of finding a species of special case, special verdict, is when the jury find the verdict generally for the plaintiff, but subject nevertheless to the opinion of the court above, on a special case stated by the counsel on both sides with regard to a matter of law; which has this advantage over a special verdict, that it is attended with much less expence, and obtains a much speedier decision; the *posse* being stayed in the hands of the officer of *nisi prius*, till the question is determined, and the verdict is then entered for the plaintiff or defendant as the case may happen. But as nothing appears upon the record but the general verdict, the parties are precluded hereby from the benefit of a writ of error, if dissatisfied with the judgment of the court upon the point of law.

If a special case is made, then it is settled by the two counsel and signed, give same to Mr. *Lowien* the clerk of the *nisi prius*, if a town cause, country cause to the associate, who will make copies for each party, move for a *consilium* by counsel, get the rule from the clerk of the rules, set the case down with the clerk of the papers, and proceed the same as on a special verdict; copies for the judges also to be delivered two days before argument.

In a case for the opinion of the court, the facts What it ought to state. proved at the trial ought to be stated, and not the evidence of the fact only: thus in trespass on a copyhold, it is not enough to state that admission of plaintiff was proved, but must state that plaintiff had title or possession. 2 *Wils.* 163. *Palmer v. Johnson.*

Of Arresting the Judgment.

ARRESTS of judgment arise from intrinsic causes appearing upon the face of the record; for a judgment can never be arrested but for that which appears on the face of the record itself. *Lord Ray.* 232.

A a

The

The court *after verdict* will do every thing they can to help the declaration. 2 Burr. 899. 1 Salk. 29.

After verdict the court will suppose every thing right, unless the contrary appear on the record. 1 Wilf. 255. Bull v. Steward. But not after judgment by default. 2 Burr. 899. Collins v. Gibbs.

Arrest of judgment.

If the party would arrest the judgment after verdict or inquisition of damages, the roll must be brought into court upon motion, and marked by the clerk of the papers, pay the clerk of the treasury 1s. 6d. It may be made at any time before judgment signed. Dougl. Rep. 747. Str. 845. Sunday is no day, 4 Burr. 2130. nor a *dies non*. It is a rule to shew cause, therefore needs no notice to be given, nor yet an affidavit to ground it, as it arises out of the record; and after judgment upon demurrer, there can be no such motion made, as the court will not suffer any one to tell them that the judgment they gave on mature deliberation is wrong. It is otherwise indeed in the case of judgment by default, for that is not given in so solemn a manner; or if the fault arises on the writ of inquiry or verdict, for then the party could not alledge it before. Edwards v. Blunt. Str. 425.

The plaintiff, on an issue tendered by the defendant, joined the issue thus: "*and the aforesaid defendant doth the like,*" instead of saying, "*and the aforesaid plaintiff doth the like,*" and this being objected in arrest of judgment, the objection was over-ruled, and the judgment established. 4 Burr. 1703.

It may be made after motion for a new trial discharged, Dougl. Rep. 716. 1 Burr. 334. and if arrested, each party pays his own costs, Coup. Rep. 407.

After verdict, a man may alledge any thing in the record, in arrest of judgment, which may be assigned for error after judgment. 2 Roll. Abr. 716. And judgment after verdict, shall not be arrested for an objection that would have been good on demurrer. 3 Burr. 1725. Weston v. Chapman.

If

If the rule is discharged, then plaintiff's attorney draws up the rule, and may proceed to tax his costs in the usual way on the *poslea* or *inquisition*.

New Trial.

NEW trials were granted before 1655. *Str.* 138. 466. A *venire de novo* is the ancient proceeding of the common law, a new trial is only a new invention; the first is as ancient as the law, when attainments were in use, but motions for new trials were introduced in this manner; the judgment in attaint was very severe, and the punishment excessively hard, and therefore to avoid that severity, it was thought better to proceed in a milder way, and so motions for new trials were introduced; they likewise differ in this respect, that new trials are generally granted where a *general verdict* is found; a *venire facias de novo* upon a *special verdict*; but the most material difference between them is this, that a *venire facias de novo* must be granted upon matter appearing upon the record, but a new trial may be granted upon things out of it, if the record be never so right. If the verdict appear contrary to the evidence given, or the judge has given wrong directions, a new trial will be granted; but it is otherwise as to a *venire facias de novo*, which can only be granted in these two cases: 1st, If it appear upon the face of the verdict, that the verdict is so imperfect, that no judgment can be given upon it. 2d, Where it appears that the jury ought to have found other facts differently, and it cannot be granted in any other case. *Ld. C. J. Willes. Leyburn v. Lewis.* 1 *Wils.* 55.

A general verdict can only be set right by a new trial. 1 *Burr.* 393. Most general verdicts include legal consequences as well as propositions of fact: in drawing these consequences, the jury may mistake and infer directly contrary to law: The parties may be surprised by a case *falsely* made at the trial, which they had no reason to expect, and therefore could not

come prepared to answer. It is absolutely necessary to justice, that there should, upon many occasions, be opportunities of *reconsidering* the cause by a new trial: And it is done in a way very favorable to the parties for whom the wrong verdict is given; it is upon payment of costs: Whereas in other cases, where a wrong judgment is reversed, costs are paid as if the right judgment had been given in the first instance. *Lord Mansfield, Bright v. Eynon. 1 Burr. 393.* The reasons for granting a new trial must be collected from the whole evidence, and from the nature of the case considered under all its circumstances. Of late years, they have been granted not only after trials *at nisi prius*, but also after trials *at bar.* *Ibid. 395.*

It must depend upon the *legal discretion* of the court, guided by the *nature and circumstances* of the particular case, and directed with a view to the *attainment of justice.* *Ibid. 397.*

Trials by jury in civil causes could not subsist now, without a power somewhere to grant new trials. *1 Burr. 390.*

New trial, what.

A new trial is retrying the cause before another jury; but with as little prejudice to either party, as if it had never been heard before. No advantage is taken in the former verdict on the one side, or the rule of court for awarding such second trial on the other; and the subsequent verdict, though contrary to the first, imports no title of blame upon the former jury, who, had they possessed the same lights and advantages, would probably have altered their own opinion. The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject; and nothing is now tried but the real merits of the case. A sufficient ground must, however, be laid before the court, to satisfy them that it is necessary to justice that the cause should be further considered, nor do the courts lend too easy an ear to every application for a review of the former verdict. They must be satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed,

discussed, and that the decision is not agreeable to the justice and truth of the case.

If a verdict is against evidence, yet if the action was frivolous and vexatious, and the real damage small, court will not grant it: which should be to attain real justice, not to gratify litigious passions, on every point of *summum jus*. 1 Burr. 11. *Mackrow v. Hull*. If against evidence, if action frivolous, will not grant it.

The court will not grant it for excessive damages, when they depend on circumstances solely under the cognizance of the jury, and fit for their decision; as for *crim. con*. For the injury suffered by the husband, and the estimate of the damages to be assessed, must in their nature depend entirely upon circumstances, which it was strictly and properly the province of the jury to judge of, the court could not say 500*l*. was too much, or that 50*l*. was too little. 1 Burr. 609. *Wilford v. Berkeley*. Nor for excessive damages, where, &c.

Nor is it granted where the scales of evidence hang nearly equal; that which leans against the former verdict, ought always very strongly to preponderate. Vide *Str.* 1142. *Ashley v. Ashley*.

Nor on nice or formal objections, which do not go to the real merits. Nice or formal objections.

Nor on account of the absence of a witness, whom the party might have had without his neglect. Nor on the absence of witness, if party could have had him. *Salk.* 647. *Str.* 691. 1 *Wils.* 98. *Cooke v. Berry*. *Term Rep.* 1 *V.* 84. *Gift v. Mason*. *Ibid.* 113. 2 *V. Vernon v. Hankey*.

In *Ducker v. Wood*. *Ld. M.* said, That there was no doubt but that the court had the power of taking the opinion of a second jury in any case where the damages were excessive; but these questions depended on their own circumstances, on which the court would exercise their discretion. 2 *Term Rep.* 277. Power of court to grant, &c. where excessive damages. Vide 2 *Wils.* 405. 3 *Wilson* 62.

There has been no instance of this court's granting a new trial on an allegation that some of the witnesses examined were interested. There never yet has been a case in which the party has been permitted after trial to avail himself of any objection, No instance of new trial on account of witnesses being interested. which

Unless the merits are doubtful,

which was not made at the time of the examination. Where it appears that one or more material witnesses who were examined on a trial were interested, it may afterwards weigh with the court as a circumstance for granting a new trial, provided the merits of the case are doubtful; but as a *substantive* objection, I am clearly of opinion that it ought not to be allowed. Per *Buller J. Turner v. Pearte, Term Rep. 1 V. 720.*

No new trial where it appears you might have given evidence on the former one.

New trials are never granted upon the motion of a party, where it appears he might have produced and given material evidence at the trial, if it had not been his own default, because it would tend to introduce perjury, and there would never be an end of causes, if once a door was opened to this. *Cooke v. Berry. 1 Wils. 98. 2 Term Rep. 84.*

Evidence on both sides.

No new trial shall be where there was evidence on both sides, though a verdict be against the judge's opinion who tried the cause. *Anon. 1 Wils. 22.*

On affidavit of jurymen.

The court will be very cautious how they grant new trials upon the affidavits of jurymen; because it would be of very dangerous tendency. *1 Wils. 330. Rex v. Simmons.*

Motions for new trials are encouraged.

Motions for new trials have been very much encouraged of late years, and I shall never discourage them; for nothing tends more to the due administration of justice, or even to the satisfaction of the parties themselves, than applications of this kind. The court and the counsel are enabled to consider the question more fully than they could do in the hurry of business at *nisi prius*. Value alone is not a ground for a new trial, although it frequently weighs in granting a rule to shew cause. Per *Buller J. Vernon v. Hankey. 2 Term Rep. 120.* It is not sufficient that the cause is of value, or of importance, but it must also involve it in a doubt to induce us to grant a new trial. The suitors frequently derive great benefit from having their causes thoroughly investigated on such motions; for it often happens by some accident, that complete justice is not done at *nisi prius*; but unless it appears to be of doubt,

Value,

doubt, it would be unjust to send the parties to another trial. Per *Grose J. Ibid.* 123.

If the party against whom the verdict is obtained wishes for a new trial, the same must be moved for ^{When to be moved for,} within four days inclusive. *Birt v. Barlow. Dougl. Rep.* 171. including the first day, (unless Sunday or a dies non intervene, or some material circumstance which must be shewn on affidavit of the delay,) and the motion is generally made on an affidavit (unless it arise from a verdict given contrary to evidence, a mis-direction of the judge at *nisi prius*, 2 *Wils.* 273. or where the jury have given excessive damages) of some new matter being discovered since the trial.

But they will not grant a new trial in penal ^{Penal actions,} actions, 3 *Wils.* 59. *Str.* 899. 1238. nor in an ^{&c.} action for a malicious prosecution, if for defendant. *Cowp. Rep.* 37. *Norris v. Tyler.*

The court may in any case grant a new trial upon ^{Excessive da-} the ground of excessive damages. *Ducker v. Wood.* ^{mages.} 1 *Term Rep.* 277.

A new trial will not be granted to give the de- ^{Illegality of a} fendant an opportunity of proving the illegality of a policy. ^{policy.} policy, which was not illegal on the face of it; for he should have shewn it on the trial. 1 *Term Rep.* 84.

The court will not grant a new trial to let the ^{Evidence at first} party into a defence of which he was apprised at trial. the first trial. *Vernon v. Hankey.* 2 *Term Rep.* 113.

Where there is complete and substantial justice ^{If justice be} done, there is no reason to grant a new trial: by all done. the judges. *Edmondson v. Machell.* 2 *Term Rep.* 4.

A new trial may be granted a second time, if the ^{Second time} reasons for granting are sufficient. 4 *Burr.* 2108. ^{granted.} *Goodwin v. Gibbons.*

A new trial may also be granted in ejectment, and ^{Ejectment.} after a trial at bar. 4 *Burr.* 2224. *Str.* 1105. *Smith v. Parkhurst.*

In an action for a libel, it was refused, though ^{Refused in an} found against the evidence for the defendant, because ^{action for a} it was no matter of contract, no special damages laid ^{libel.} or proved, but only a vindictive action; and courts

of justice will not assist the passions of mankind,
Burton v. Thompson. 2 Burr. 665.

After a nonsuit.

A new trial may be granted after nonsuit, if improperly directed by the judge. *4 Burr. 1986.* or upon proper and sufficient grounds.

Personal torts.

A new trial will seldom be granted in cases of personal torts for excessive damages. *Cow. Rep. 230.* It ought not to be granted merely for the sake of turning the party round; but where substantial justice cannot otherwise be obtained. *Ibid. 601.*

Sometimes granted without costs.

It is often on good ground granted without costs, and the plaintiff cannot have them, unless specially directed in the rule, although the second verdict is the same as the first. *Mason v. Skurray. Dougl. Rep. 438.*

But if the rule is discharged for a new trial, and nothing said about costs, the master will allow them.

A writ of inquiry may be set aside for smallness of damages, *Str. 1259.* or excessive.

Setting up new evidence.

It would be of dangerous consequence, to suffer people to be setting up new evidence, after they knew what was sworn before. *Price v. Brown, Str. 691.*

How to move for a new trial.

It is a rule to shew cause, therefore unnecessary to give notice to the opposite party; draw up rule and serve it, and the day before it comes on to be heard, speak to the *chief justice's clerk*, or *judge's clerk, who tried the cause*, to bring his book to *Westminster*, (or if it be a judge of another court,) speak to the *clerk for the judge's report* as soon as moved for, who will deliver it to the *puisne judge* of the court where the cause was tried. If the judge on the report declares himself satisfied with the verdict, it will be difficult to obtain a new trial; on the other hand, it is pretty much of course to grant the rule. It is convenient to give notice, that the opposite side may attend, and observe upon what grounds the motion is made, though not *absolutely necessary* perhaps, unless to stay proceedings in the mean time.

If

If the verdict should be set aside, draw up rule and serve it; and if on payment of costs, they must be forthwith paid, the rule being conditional; or you may move the court for liberty to enter up the judgment, and take out execution: If the costs are paid, then the *nisi prius record* is not to be engrossed anew, unless the *poslea* be indorsed on the back; if it is, Mr. Provoost will not pass the old record again. *N. B.* The *jurata* must be altered, as to the return, and the record must be passed again; but no new entries are made or paid for, but a new *venire* and *distringas* must be sued out and returned as in common cases, and cause set down anew; and also notice of trial must be given afresh.

Entry of Pleadings.

Of entering Pleadings on the Roll, and docquetting same.

THE roll, or entry of the *issue*, or pleadings between the parties, is to be entered in a full fair hand, with a large margin of an inch at least, and a convenient distance at the top, for the binding up of the same, and at the bottom, that the writing be not rubbed out, *R. Hil. 1657*; and when you have occasion to write on the back-side of the roll, you must begin over against the first line of the first warrant of attorney, leaving a margin as on the other side.

The manner of making the entries.

By rule, *Mich. 5 Ann.* every attorney shall bring in all his rolls into the office fairly ingrossed by the times limited by the former rules; the rolls of *Trinity*, *Michaelmas*, and *Hilary terms*, before the *essoign day* of every subsequent term, and the rolls of *Easter* term, before the first day of *Trinity* term.

Rolls to be brought in.

No rolls to be received or allowed for by the clerk of the treasury, unless marked by the person appointed

Rolls.

appointed

- pointed by the chief justice to deliver out rolls, *Trin. 12 Geo. 2. 1738.*
- Warrants of attorney.** Warrants of attorney to be entered on the roll at the beginning of the cause, otherwise the roll not to be received or filed. *R. E. 4 Jac. 2.*
- Indulgence allowed.** The *custos brevium* now indulges the attornies by attending at the *King's Bench* office the day but one before every term, except *Trinity*, when he attends the day preceding that term, to receive and file their rolls.
- Where to begin on the roll.** The space or room here spoken of for the entry to be left for the press, is made by the clerk appointed to deliver out the rolls, now Mr. *Adams* of *Lincolns-Inn*, stationer, who puts a stamp in the middle of the roll, near where the file goes through; two inches below which, you enter in a large hand thus: "Hitherto of the term of *St. Michael*, 32d *Geo. 3.* 1791, Witness *Lloyd* lord *Kenyon*;" then enter your warrants of attorney for the plaintiff and defendant, thus:
- Plaintiff's warrant.** *Middlesex, (fs.)* John Doe puts in his place James Strong his attorney, against Richard Roe in a plea of trespass on the case.
- Defendants.** *Middlesex, (fs.)* The said Richard Roe puts in his place, James Ward his attorney, at the suit of the said John Doe, in the plea aforesaid.
- Nature of the action to be expressed.** The nature of the action must be expressed in the warrant of attorney, according as the case shall be, as thus: "in a plea of trespass and assault; in a plea of trespass, assault, and false imprisonment; in a plea of trespass on the case; in a plea of trespass and ejection; in a plea of debt; in a plea of trespass; in a plea of detinue."
- Middlesex, (fs.)* Be it remembered that [here enter the whole issue thereon].
- On an issue.** If there be an issue joined between the parties, the roll must be filed of that term in which the issue is joined.
- Interlocutory or other judgment, of what term to be entered.** So if an interlocutory judgment is signed, the entries must be of that term the judgment is signed: If on a confession, or by warrant of attorney, the same

same term as you sign it must be inserted, as thus: *Hitherto of the term of St. Michael, in the 32d year of the reign of king George the third. Witness Lloyd lord Kenyon.* Then enter the warrant of attorney for the plaintiff and defendant, with a memorandum, as under title *Issue*; if the plaintiff be *nonprossed*, *Nonpros*, either for want of declaring, replying, or entering his issue on record, you may enter both warrants of attorney on the roll. No plea roll to be filed after the term following that of which it ought to be filed. *R. E. 9 W. 3.*

The warrants of attorney are supposed to be filed at the commencement of the action. 1 *Ld. Raym.* 509. and *R. E. 4 Jac. 2.*

If the roll be not carried in and filed, as of the *Post terminum*, term issue is joined, then you will have to pay a *post terminum*, which is 4s. 8d. and 1s. more for the docket; also the clerk will charge you a *post diem*, one day before the term begins, if your roll is not filed in time.

Go to the clerk of the judgments, King's Bench Docketting rolls, office (if it is in the same term your issue is entered, or judgment signed), with whom the docket or number rolls are left, and get of him as many numbers as you want, subscribe your name on the docket, then make out the docket paper; but if your docket is of a preceding term, then you get a number roll at the *nisi prius* office, *Westminster*, or at Mr. *Way's* office first, for which you pay 4s. 8d. carry the roll to the clerk of the judgments, and he will enter it. Make out your docket paper thus:

The entry of C. K. gentleman, one, &c. of the Docket paper. term of *St. Michael*, 32 *Geo. 3.* 1791.

London.	Issue joined in case between <i>J. D.</i> plaintiff, and <i>Richard Fenn</i> , defendant, on a plea of <i>non assumpsit</i> .	Roll.
		500
Middlesex.	The like issue in assault, between <i>A. B.</i> plaintiff, and <i>C. D.</i> defendant, on a plea of not guilty, and <i>son assault demesne</i> .	501
		<i>Middlesex.</i>

<i>Middlesex.</i>	The like issue in debt, between <i>A. B.</i> plaintiff, and <i>C. D.</i> defendant, on a plea of <i>non est factum.</i>	502
<i>Surry.</i>	Judgment by default in case, between <i>A. B.</i> plaintiff, and <i>C. D.</i> defendant.	503
<i>Surry.</i>	Judgment by confession, between <i>A. B.</i> plaintiff, and <i>C. D.</i> defendant, for 6 <i>l.</i> debt, and 6 <i>3s.</i> costs.	504
<i>Middlesex.</i>	Judgment by <i>nil dicit</i> , between <i>A. B.</i> plaintiff, and <i>C. D.</i> defendant, for 600 <i>l.</i> debt, and 6 <i>3s.</i> damages.	505
<i>Middlesex.</i>	Entry of two <i>scire facias</i> 's in debt, between <i>John Doe</i> , plaintiff, and <i>Richard Roe</i> , defendant, for 1000 <i>l.</i> debt, and 6 <i>3s.</i> damages.	506
<i>Middlesex.</i>	Entry of one <i>scire facias</i> between, &c. with an award of the second for 1000 <i>l.</i> debt, and 6 <i>3s.</i> damages.	507
<i>Middlesex.</i>	Judgment of <i>assets in futuro</i> between <i>A. B.</i> plaintiff, and <i>C. D.</i> executor of <i>J. D.</i> deceased, defendant, for 100 <i>l.</i> debt.	508
<i>Middlesex.</i>	Nonpros for not declaring between <i>A. B.</i> plaintiff, and <i>C. D.</i> defendant, for 3 <i>3s.</i> costs.	509

Take this docket paper to the clerk of the judgments, and, if all the entries are paid for, he will mark the roll, by putting his stamp thereon; pay 3*s.* then go to the clerk of the treasury, who waits without that office, and give the rolls to him; he pays you 4*d.* for every roll, and afterwards files them in the treasury.

Clerk of the
treasury enters
final judgments.

If the roll is already carried in, which is often the case after issue is joined, and before trial, the *posse*, or *inquisition*, with the master's *allocatur* thereon, is to be taken to *Westminster* to the treasury, and the clerk

clerk on leaving it will enter the judgment thereon; pay him 2s. for *poslea*, 1s. 6d. for inquiry.

By fiat 4 & 5 W. & M. c. 20. s. 3. "No judgment not docketted and entered in the books, shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, and administrators, in their administration of their ancestors, testators, or intestates estates." Judgment is not docketted, &c.

It is a great pity that the legislature does not interfere by way of penalty upon the attornies for not carrying in their rolls; or that the court do not make a rule to enforce them to be filed of record, at the times mentioned in the rule, as it tends to great inconvenience, and makes the young practitioner very ignorant in his profession, for by making the entries complete, he thereby gets properly skilled in the art of good pleading. *Vide 2 Burr. 723.* Hint to the court.

If the defendant has either a freehold or leasehold estate in *Middlesex* or *York*, you may register the judgment, which will affect them from the day of the registering. May register judgment.

A memorial to be registered pursuant to the statute, &c. Memorial of a judgment.

Of a judgment in his majesty's court of *King's Bench*, of *Trinity* term, in the 31st year of the reign of king *George* the third, between *John Stokes* plaintiff, and *Richard Fenn* defendant, in a plea of debt for 1000*l.* and 63*s.* damages. *Roll 50.*

I do hereby certify that judgment was signed in the above cause the 19th day of *June* 1791. Certificate of the master.

Edward Benton.

J. B. clerk to *A. B.* of, &c. gentleman, maketh oath and saith, that he was present and did see *Edward Benton*, esquire, secondary of the court of *King's Bench*, sign the certificate of the judgment in the memorial above mentioned. Affidavit.

Ingross this memorial and certificate on a piece of parchment, with a treble 6*d.* stamp thereon, carry it to the master of the *King's Bench* office, and he will, on seeing your *poslea*, *inquisition*, or judgment paper, subscribe the certificate; swear the affidavit

affidavit before a master in chancery, or a judge of the court where the judgment was obtained; and when done, file it with the register in *Bell-yard*. Pay the master 1s. oath 1s. and 5s. filing.

N. B. The clerk of the docquets may certify in the absence of the master or his deputy.

Continuances on the Roll and Judgment after Trial.

Continuances of the *venire* on the roll.

IF your cause be not tried the same term the issue is delivered, the *venire* must be continued on the roll, by *vicecomes non misit breve*; as, supposing an issue joined in *Easter* term, and the cause not tried till *Trinity*; then after the award of the first

Continuance of the *venire* by *vicecomes non misit breve*.

venire, "*the same day is given to the parties aforesaid at the same place,*" add this, "At which day before our said lord the king at *Westminster* came the parties aforesaid, by their attornies aforesaid; and the sheriff did not return the said writ, nor did he do any thing thereupon; therefore let a jury thereupon come before our lord the king at *Westminster*, on *Friday* next after the morrow of the holy *Trinity*, by whom, &c. and who neither, &c. to recognize, &c. the same day is given to the parties aforesaid, at the same place." And if it be to *Michaelmas* term, award a new *venire* over to the first day, "*at which day,*" &c. as above, in the same manner, from term to term; then if the cause is tried, enter on the roll thus:

Continuance of the process and judgment thereon.

Afterwards the process being continued between the parties aforesaid, of the plea aforesaid, by the jury being respited between them, before our lord the king at *Westminster*, (*until the return of the dis-tringas,*) unless^a the king's right trusty and well-beloved *Lloyd* lord *Kenyon*, his majesty's chief justice, assigned to hold pleas before the king himself, shall first come on, &c. (the day mentioned in

^a If at the assizes, follow the words of the *jurata* unless the king's justices, &c.

the jurata,) (at the Guildhall of the city of London,) according to the form of the statute in such case made and provided, for default of the jurors, because none of them did appear; at which day before our lord the king at *Westminster*, comes the said *A. B.* by his said attorney; and the said chief justice^b, before whom the said issue was tried, sent hither his record had in these words, to wit, Afterwards, that is to say (here enter the *poslea* verbatim from the record to the word therefore,) then say, It is considered that the said *A. B.* recover against the said *C. D.* his said damages, by the said jury, in form aforesaid assessed; and also 4*l.* for his costs and charges, by the court of our said lord the king, now here, adjudged to the said *A. B.* by his assent, which damages in the whole amount to 100*l.* and that the said *C.* be in mercy, &c.

If in Middlesex, at Westminster-hall in the said county.

^b The said justices of our lord the king.

Judgment signed the 19th day of June 1791.

For the entry of other judgments on the roll, Mercy.
Vide title Judgment.

Executors and Administrators.

ADJUDGED, that when executors sue upon any contract of their testator, or for any wrong done to him, they shall pay no costs, either upon a nonsuit or verdict against them. 3 *Salk.* 105. *Bigland v. Robinson.* Vide, as to the nonsuit, 1 *Salk.* 207. 3 *Burr.* 1586.

Of executors and administrators.

If an executor or administrator confesses a judgment, and there are not assets sufficient, he is liable to pay the costs *de bonis propriis*; therefore care ought to be taken before such judgment is confessed, that he receive no injury.

If they plead a false plea.

If an executor or administrator plead a false plea, that is, such a plea as will be a perpetual bar to the plaintiff, and which, of his own knowledge, he knows to be false, such as *ne unquis executor*, or a release made to himself, and it is found against him, the judgment will be "*de bonis testatoris, si. &c. si*"
" *non*

False plea.

“*non de bonis propriis*,” for thereby he estrangeth himself from the testator, and the benefit of the will, and, by his own falsity and folly, hath made his own goods chargeable. *Roll. Abr.* 930. *Cro. Jac.* 671. 191. *Moor* 69.

If they suffer judgment by default.

If an executor confesses or suffers judgment by default, he admits assets in his hands, and is estopped to say to the contrary on a *devastavit* returned, and so is a jury. *Lutw.* 670. And the sheriff may return a *devastavit* on the first *fi. fa.* if he will. It is at his peril if false, and the inquiry is only for his safety. 1 *Salk.* 30. So in an action on such judgment suggesting a *devastavit*, and he is liable to costs. 6 *Mod.* 308. *Ld. Ray.* 589. 591. *Vide* 1 *Wils.* 258.

When they pay costs.

So an executor, defendant, shall pay costs in all cases, and the judgment is *de bonis testatoris, si, &c. et si non, tunc de bonis propriis*: also when he is defendant, and there is judgment for him, he shall have his costs. *Cro. Eliz.* 503. *Plow. Com.* 183. *Hutt.* 69.

Upon a writ of inquiry cannot give in evidence want of assets.

If an executor suffers judgment to go against him by default, upon executing a writ of inquiry, he shall not give evidence of want of assets, for he is estopped, as if it had been the case of an heir, for he should have pleaded *plene administravit*, or specially *what assets* he has. 6 *Mod.* 308. So if judgment be given against an executor upon demurrer, and execution be awarded, the sheriff cannot return *nulla habet bona testatoris*, but is to return a *devastavit*, as if it had been found against the executor by verdict, for he hath charged himself by his own plea. *Cro. Eliz.* 102.

After two *nibils* returned, the court will relieve on motion, if defendant comes in a reasonable time.

Judgment against the testator, *scire facias* against the administratrix, and two *nibils* returned, a *scire fieri* inquiry was taken out, and the defendant attended the execution in order to lay the state of the assets before the jury: this was refused. She appeared in *Hil.* 8. *Geo.* 2. to the *sci. fa.* inquiry, pleaded *plene administravit*, and traversed the *devastavit*. On notice of trial and countermand, she

in *M. 10 Geo. 2.* moved to have the award of execution set aside, and to be admitted to plead, it being to no purpose to expect relief on the trial of the traverse. *Salk. 93. 264.* was cited, to shew the court will relieve on motion where no *sci. fa.* had issued, and the state of the real assets was proved to be 130*l.* which he offered to deliver up. *Cur.* thought that she came too late, and refused to interpose for that reason only. *Wharton v. Richardson. Str. 1075.*

If an action of debt on an obligation be brought against an executor, who pleads *plene administravit*, and the plaintiff replies assets, which are found by the jury to be 172*l.* that a judgment to recover the entire debt and damages, and costs of the goods of the testator, *si, &c. et si non, tunc*, the damages of his proper goods, is good; for that the defendant's bar being in effect, that he had not assets, the same amounted to a confession of the debt, on which the plaintiff may take judgment immediately, though he cannot have execution, until assets come to the hands of the executors. *8 Co. 134. Hob. 199. Lev. 286.*

When judgment shall be *de bonis testatoris*, and when against the executor.

If an executor brings error of judgment after a *de- vastravit*, he shall pay costs. *Str. 977.*

Error costs.

An executor is liable to pay costs on a *non-pros*, for not declaring, but not upon a discontinuance. *3 Burr. 1584. Hawes ex. v. Saunders.*

Liable on *non pros* for not declaring.

But not in all cases of discontinuance without paying costs. For if it is plainly his own fault, he shall not have such leave; so in the case of not going on to trial, if it is his own laches, he shall pay costs. *1 Salk. 314. 4 Burr. 1929. Bennet v. Coker.*

Liable to costs not going to trial.

On an action brought by an administrator against an heir, plaintiff did not try according to his notice, the defendant moved for judgment, as in the case of a nonsuit, whereupon the plaintiff undertook to try peremptorily; when the cause came to trial, the plaintiff discovered that the estate had been conveyed, and was then satisfied that the deed would be

After motion for judgment, as in the case of a nonsuit, the administrator had leave to discontinue, though he undertook peremptorily to try.

B b

produced

produced against him; whereupon he declined going to trial: and now desired to discontinue without costs. The court granted the motion, but he was not to bring any new action, without leave of the court. 4 Burr. 1927. *Bennet adm. v. Coker*.

Rules to be observed by executors as to payment of debts.

In payment of debts, the executor must observe the rules of priority, otherwise, on a deficiency of assets, if he pays those of a lower degree *first*, he must answer those of a *higher* out of his own estate. *First*, He may pay all funeral charges, and the expence of proving the will, and the like. *Secondly*, Debts due to the king, on record or specialty. 1 Andr. 129. *Thirdly*, Such debts as are, by particular statutes, to be preferred to all others; as the forfeitures for not burying in woollen, stat. 9 Ann. c. 10. Money due on poor's rates. 30 Car. 2. c. 3. *Fourthly*, Debts of record, as judgments (docketted according to the 4 & 5 W. & M. c. 20.), statutes and recognizances, 4 Rep. 60. Cro. Car. 363. *Fifthly*, Debts due on special contracts; as for rent, or upon bonds, covenants, and the like, under seal. Wentw. c. 12. *Lastly*, Debts on simple contracts, viz. notes and verbal promises; among these simple contracts, servants wages are by some with reason preferred to any other. 1 Roll. Abr. 927.

When he may retain.

Among debts of an equal nature, the executor or administrator is allowed to pay himself first, by retaining in his hands so much as his debt amounts to, 10 Mod. 496. and he may give it in evidence. 3 Burr. 1383. Wherever an executor or administrator may be sued, or might have paid, he may retain. *Ibid.* 1384. Covenant is as much a lien upon the assets, as an action of debt. *Ibid.*

Old method of obtaining judgment *de bonis propriis*.

The old way to obtain judgment against an executor or administrator, *de bonis propriis*, was to get a *fieri facias* returned by the sheriff, "that the testator had no goods," then to issue a *scire fieri* inquiry, reciting the *fi. fa.* and suggesting that they were wasted, and commanding the sheriff to inquire whether the defendant had wasted any of the deceased's effects or not; and upon the sheriff's return

turn of a *devastavit*, a *scire facias* issued against the defendant, "to shew cause why the plaintiff should not have judgment, de bonis propriis," to which the defendant might appear and plead *plene administravit*: but lately the mode has been either to bring an action suggesting a *devastavit*, or issue a *scire facias*, in which is contained a *fi. fa.* which was devised as the speedier way to obtain execution on the judgment. *Ld. Ray. 1382. vide Str. 623.*

But this is said not to be a good way to proceed where the debt is small, as no costs are allowed to the plaintiff, unless the defendant pleads to the *scire facias*: therefore the best way is, to bring an action suggesting a *devastavit*, and before brought, it is necessary that a *fi. fa.* be returned by the sheriff *nulla bona*, as to the goods of the testator.

For judgments against executors, vide title *Judgments*.

Postea.

Postea for Plaintiff on non assumpsit.

AFTERWARDS (that is to say) on the day and at the place within mentioned, before the *Right Honourable Lloyd lord Kenyon*, the chief justice within written, *Roger Kenyon, esq.* being associated unto the said chief justice, by force of the statute in that case made and provided, the within named *C. D.* came by his attorney within contained, and the within named *E. F.* although solemnly required, came not, but made default, therefore let the jurors of that jury within mentioned be taken against him by his default: and the jurors of that jury being summoned, came, who to say the truth of the within contents, being chosen, tried and sworn, say, upon their oath, that the within named *E. F.* did undertake and promise, in manner and form as the within named *C. D.* hath within complained against him; and they

To be ingrossed on the back of the record with a double half-crown stamp, and marked by the clerk of the common bails, "delivered of record," pay him 6d. then go to the master to tax the costs, pay in case and debt 4s. in trespass 6s. 8d. more for the fine.

assess the damages of the said *C. D.* by occasion of the not performing the within mentioned promises and undertakings, over and above his costs and charges, by him about his suit, in this behalf expended, to 112*l.* and for those costs and charges to 40*s.*

With a tales.

Afterwards (that is to say) on the day and at the place within mentioned, before the *Right Honourable Lloyd lord Kenyon*, the chief justice within written, *Roger Kenyon, esq.* being associated unto him, according to the form of the statute in that case made and provided, came the within named *A. B.* by his attorney within contained, and the within named *C. D.* although solemnly required, came not, but made default; therefore let the jury, whereof mention is within made, be accepted of against him by his default; and the jurors of that jury being summoned, some of them, (that is to say [*here name only the jurors that appeared on the panel*]); and because the residue of the jurors of the same jury do not appear, therefore other persons of those standing by the court, by the sheriff of the county aforesaid, at the request of the said *A.* and by the command of the said chief justice (if in *London or Middlesex*), if at the assizes, then (by the command of the said justices) are now newly set down whose names are assiled in the within written panel, according to the form of the statute in that case made and provided; which said jurors, so newly set down, (that is to say) *K. L.* of, &c. haberdasher (naming the rest of the talesmen), being required, came, who, together with the said other jurors before impanelled, and sworn to declare the truth of the within contents, being elected, tried, and sworn, upon their oath, say, that the said *C. D.* did undertake and promise in such manner and form as the said *A.* hath within complained against him; and they assess the damages of the said *A. B.* by reason of the not performing the promises and undertakings within written, besides his expences and costs laid out by him in this behalf, to 12*l.* and for those costs and charges to 40*s.* therefore, &c.

Say,

Say, upon their oath, that the within mentioned writing obligatory, is the deed of the within named *E. F.* as the within written *C. D.* hath within declared against him, and they assess the damages of the within named *C. D.* by occasion of the detaining the within debt, over and above his costs and charges by him about his suit expended, to 1s. and for those costs and charges to 40s. therefore, &c.

For plaintiff on
non est factum.

Say, upon their oath, that the within named *C. D.* doth owe to the within named *A. B.* the said 20l. within mentioned, in manner and form as the said *A. B.* hath within complained against him, and they assess the damages, &c. *ut supra.*

Do. on *nil debet.*

Say, upon their oath, that the within named *C. D.* is guilty of the premises within laid to his charge in manner and form as the said *A. B.* within complains against him, and they assess the damages of the said *A. B.* by occasion thereof, over and above his costs and charges, &c. as before.

Do. in trespass.

Say, upon their oath, that the said *A.* (the defendant) hath, and on the day of exhibiting the bill of the said *C.* within written, had divers goods and chattels, which were of the said *J. H.* within mentioned at the time of his death in her hands to be administered, to the value of the debt within specified, whereof she might have made satisfaction to the said *C.* for his said debt, as the within named *C.* in his said replication hath alledged, and they assess the damages of the said *C.* by occasion thereof, besides his expences and costs by him about his suit in this behalf expended, to 40l. and for those costs and charges to 40s. therefore, &c.

For plaintiff on
a plea of *plene*
administavit.

Say, upon their oath, that the said *C.* is guilty of the trespass and ejectment within written, in manner and form as the said *B.* hath within complained against him; and they assess the damages of the said *B.* by occasion thereof, over and above his expences and costs, laid out by him about his suit in this behalf, to 1s. and for those expences and costs to 40s. therefore, &c.

For plaintiff in
ejectment.

For plaintiff on
non assumpsit
infra sex annos.

Say, upon their oath, that the said *C. D.* did within six years next before the day of exhibiting the bill of the said *A. B.* undertake and promise in manner and form as the said *A. B.* hath within by replying alledged, and they assess, &c.

Do. on not guilty in trespass.

Say, upon their oath, that the said *C. D.* and *E. F.* are not guilty of the trespass in the declaration within specified, as the said *C.* and *E.* have within complained against them, and they assess, &c.

For defendant on
a plea of *pene*
administravit.

Say, upon their oath, that the within named *John*, at the time of exhibiting the bill of the said *James* within mentioned, did fully administer all and singular the goods and chattels which were of the said *T.* at the time of his death, in his hands to be administered; and that he the said *John* had not, nor on the day of exhibiting the within bill or at any time afterwards had, any goods or chattels which were of the said *T.* at the time of his death, in his hands to be administered, wherewith he was able to pay the debt within specified, or any part thereof, to the said *James*, as he the said *John* hath within in pleading alledged; therefore, &c.

On *non assumpsit*
by an executor.

Say, upon their oath, that the within written *C. D.* the testator, did in his life-time undertake and promise in manner and form as the said *A. B.* hath within declared against him; therefore, &c.

For plaintiff on
an issue of *solvit*
ad diem.

Say, upon their oath, that the within written *C. D.* in his life-time, and before the day of his exhibiting the within written bill, did not pay or cause to be paid to the within named *A. B.* the within mentioned sum of 100*l.* and all interest due for the same, as the said *L.* hath within in pleading alledged, and they assess the damages of the said *A.* by reason thereof, besides his expences and costs laid out by him about his suit in this behalf, to 1*l.* and for those expences and costs to 40*s.* therefore, &c.

For defendant on
non assumpsit.

Say, that the said *C. D.* within named, did not undertake and promise in manner and form as the said *C. D.* hath within in pleading alledged; therefore, &c.

Being

Being elected, impanelled, and sworn to declare the truth of the within contents, as to the first *issue* joined, between the said *John* and the said *James*, declare upon their oath, that the said *James* is guilty of the premises within charged upon him, as the said *John* hath within alledged; and as to the other *issue* joined between the said *John* and the said *James*, the said jurors upon their said oath further say, that the said *James* of his own wrong, and without any such cause, as the said *John* within in pleading hath alledged, made an assault upon the said *John*, and then and there did beat, bruise, wound, and ill-treat the said *John* in manner and form as the said *John* hath within in his said replication in that behalf alledged, and they assess the damages of the said *John* by reason thereof, besides his costs and charges by him laid out, about his suit in this behalf, to 5*l.* and for those costs and charges to 4*os.* therefore, &c.

For plaintiff in assault on two pleas.

And the jurors of that jury, being summoned, came; who, to say the truth of the within contents, were chosen, tried, and sworn; and after evidence being given to them of and upon the within contents, went from the bar of this court, to discourse of their verdict of and upon the premises; and after the said jury had discoursed and agreed among themselves, they came back to the said bar to give their verdict in this behalf; upon which the said *A. B.* (the plaintiff) being solemnly required, came not; nor did he further prosecute his said bill against the said *C. D.* therefore, &c.

On a nonsuit.

Afterwards, that is to say, on the day, and at the place within mentioned, before Sir *Francis Buller*, Baronet, one of the justices assigned to hold pleas in our court before us, *Roger Kenyon*, Esquire, being associated unto the said justice by force of the statute in such case made and provided, the within named *J. H.* came by his attorney within contained, and the within named *W. P.* although solemnly required, came not, but made default, therefore let the jurors of that jury within mentioned be taken

Postea in debt upon five issues, there being a demurrier to the replication to the sixth plea.

against him by his default; and the jurors of that jury being summoned came, who, to say the truth of the within contents, being chosen, tried, and sworn, say, upon their oath, That the within mentioned writing obligatory is the deed of the within named *W. P.* And the jurors aforesaid, upon their oath aforesaid, further say, That the said *W. P.* did not at any time before the day of the exhibiting of the bill of the said *J.* pay to the within named *J.* the whole principal money due by the said condition of the said writing obligatory, or any part thereof, in manner and form as the within named *J.* hath in his replication secondly within alledged: And the jurors aforesaid, upon their oath aforesaid, further say, That the within named *W.* did not pay to the said *J.* the within mentioned sum of 80*l.* or any part thereof, on the said first day of *February*, in the said condition of the said writing obligatory mentioned, according to the form and effect of the said condition, in manner and form as the within named *W.* hath in his said plea within alledged: and the jurors aforesaid, upon their oath aforesaid, further say, That at the time of the exhibiting the bill of the said *J.* against the within named *W.* there was and still is the sum of 80*l.* due and payable by the within named *W.* to the said *J.* on the said writing obligatory in the within declaration mentioned, by virtue of the condition of the said writing obligatory, in manner and form as the within mentioned *J.* hath in his replication to the plea of the said *W.* fourthly alledged: And the jurors aforesaid, upon their oath aforesaid, further say, That the within named *J.* was not, nor is indebted to the within named *W.* in manner and form as the said *W.* hath in his fifth plea within alledged; and they assess the damages of the said *J.* by occasion of the detaining the within debt, over and above his costs and charges by him about his suit expended, to 1*s.* and for those costs and charges to 40*s.* therefore, &c.

Executions.

Executions.

AN execution is a judicial writ, grounded on the judgment of the court from whence it issues; and is supposed to be granted by the court, at the request of the party at whose suit it is, to give him satisfaction on the judgment which he hath obtained: and therefore an execution cannot be sued out in one court upon a judgment obtained in another.

There are but *three* sorts of execution commonly in use at this time for the obtaining satisfaction for a debt, damages, or costs given by the judgment, viz. a *capias ad satisfaciendum* against the body of the defendant only; and whenever the body is taken by this writ, the plaintiff can have no other execution against his goods and chattels, lands or tenements; for as *corpus humanum non recipit aestimationem*, so it is deemed the greatest and highest satisfaction one man can have of another. And hence if a man died in custody before the 24 *Jac.* 1. c. 24. on this writ, the debt was presumed to be satisfied; but by this statute he may have other execution against his lands or goods at his election. A *fieri facias* against the goods and chattels of the defendant only, and an *elegit* against the goods and chattels (except oxen and beasts of the plough), and also one half of the defendant's lands, to hold by the plaintiff, until the debt, or damages and costs, are satisfied.

To be ingrossed on a 2s. 6d. stamp parchment, and sealed, pay 7d. if a *testatum*, 1s. 2d.

If the judgment be in a debt on bond, direct the execution to be levied for the debt as well as *sheriff's poundage and fees*, which is to be taken out of the penalty. If levied in debt.

If it be levied upon a judgment in case, then you can only levy the damages recovered with the costs; in this case, add the costs to the damages recovered, and they are all called *damages in the writ*. If in case.

There

Cannot be two
executions at one
time.

There ought not to be two executions existing at the same time, but you may have a *fi. fa.* first, and if the sheriff does not levy to the amount of the debt, or damages recovered, you may have a *ca. sa.* for the residue; in such case, the sheriff *should return the fi. fa. and the levy thereon first*, which ought to be recited in the *ca. sa.* *Salk. 218. Cro. Eliz. 344.* but if he does nothing on the *fi. fa.* then there is no necessity to recite the sheriff's return in the *ca. sa.* or of its having been issued.

An *elegit* may be
had after *fi. fa.*

An *elegit* may be had after a *fi. fa.* but if once the body is taken, there cannot be a *fi. fa.* or *elegit*; for the body is deemed the highest satisfaction the plaintiff can have.

To be sued out
within a year
and a day.

These executions must be sued out within a year and a day after the judgment signed; and the time is to be accounted from the *day of signing judgment.*

When no *sci. fa.*

But if it be taken out and returned by the sheriff within the year, there needs no *scire facias* before you sue out another; and it is proper to award the first on the roll, with the sheriff's return thereon. *Str. 100. Aires v. Hardress. N. on R. E. 5 Geo. 2.*

When a con-
tempt.

Actions were brought upon a promissory note against the drawer and indorser, and judgments in both. Defendant having tendered the principal in one, and the costs in both, court ordered that no execution should be taken out. *Str. 515. Idem v. Trull.*

May be sued
where no benefit
from *elegit*.

If you first sue out a *fieri facias* against the defendant's goods, and levy part thereof, you may afterwards have a *ca. sa.* against his body for the residue; or a second *fi. fa.* or an *elegit* for the residue; but if you first imprison upon a *ca. sa.* you cannot have a *fi. fa.* or an *elegit*.
This writ may be sued out after an *elegit* executed only on goods, and a *nihil* returned as to the lands; for there being a *nihil* returned as to the lands, the *elegit* was but in the nature of a common *fieri facias*. The election is not complete unless the plaintiff has some benefit from the land. *Bacon v. Peck. Str. 226.*

Ca.

Ca. sa. in debt.

George the third, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, &c. To the Sheriff of Middlesex, greeting: We command you, that you take *C. D.* if he be found in your bailiwick; and him safely keep, so that you have his body before us at *Westminster*, on *Monday* next after the morrow of *All Souls*, to satisfy *A. B.* of 2,100*l.* which the said *A. B.* lately in our court before us at *Westminster* recovered against him: as also 63*s.* which in our said court before us were adjudged to the said *A.* for his damages which he had sustained as well by occasion of the detaining that debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said *C. D.* is convicted, as appears to us of record; and have you there then this writ. Witness *Lloyd* lord *Kenyon*, at *Westminster*, the 13th day of *July* in the 31st year of our reign.

J. Nixon.
Levy 653*l.* 3*s.* besides Sheriff's poundage, and all other incidental expences.

In

The like in case.

George the third, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, &c. To the Sheriffs of London, greeting: We command you, that you take *Richard Fenn*, if he be found in your bailiwick; and him safely keep, so that you have his body before us at *Westminster*, on *Monday* next after the morrow of *All Souls*, to satisfy *John Denn* 500*l.*; which were adjudged to the said *John* in our said court before us at *Westminster* for his damages which he had sustained, as well by reason of the non-performance of certain promises and undertakings made by the said *Richard* to the said *John*, as for his costs and charges by him about his suit in that behalf expended, whereof the said *Richard* is convicted, as appears to us of record; and have there then this writ. Witness *Lloyd* lord *Kenyon* at *Westminster*, the 13th day of *June*, in the 31st year of our reign.

J. Nixon.

Levy the whole.

In

To be sued out in the county where the venue is laid.

In covenant.

For his damages, which he had sustained as well by reason of a certain breach of covenant made between the said *John* and *Richard*, as for his costs and charges by him expended in and about his suit in that behalf, whereof the said *Richard* is convicted, as appears to us of record.

Trespass and assault.

For his damages, which he had sustained as well by occasion of a certain trespass and assault, made on the said *John* by the said *Richard*, as for his costs and charges, &c.

Trespass.

For his damages, which he had sustained, as well by occasion of a certain trespass done to the said *John* by the said *Richard*, at *L.* in your county, as for his costs, &c.

For the defendant.

To satisfy *Richard Fenn* 14*l.* 10*s.* which were adjudged to the said *Richard* in our court, before us at *Westminster*, accord-

In ejectment for damages.

For his damages, which he had sustained as well by occasion of a certain trespass and ejectment of farm, done to the said *John* by the said *Richard* at *L.* in your county, as for his costs and charges by him expended in and about his suit in that behalf, whereof, &c.

Replevin.

For his damages, which he had sustained as well by occasion of the taking and unjustly detaining the cattle of the said *John*, at *W.* in a certain place called the *H.* in your county, &c. as for his costs, &c.

For words.

For his damages, which he had sustained, as well by occasion of the speaking and publishing certain false and scandalous words by the said *Richard* of the said *John*, as for his costs and charges, &c.

On a nonsuit.

To satisfy *Richard Fenn*, 12*l.* 10*s.* which were adjudged to the said *Richard* in our court, before us at *Westminster*, accord-

according to the form of the statute in such case made and provided, for his costs and charges by him laid out about his defence, in a certain plea of trespass on the case, prosecuted in our said court before us, by the said *John* against the said *Richard*; and have you there then this writ. Witness, &c.

according to the form of the statute in such case made and provided, for his costs and charges which he sustained by reason of the false claim of the said *John*, in a certain plea of trespass on the case, prosecuted in our said court before us, by the said *John* against the said *Richard*; and have, &c.

In a penal action.

To satisfy us and *John Denn*, who sues as well for us as himself in this behalf, 450*l.* debt, which the said *John*, who sues as aforesaid, in our court, before us; recovered against the said *Richard*, (that is to say) one moiety thereof, to wit, 225*l.* to the said *John*, who sues as aforesaid, to his own proper use, and the other moiety thereof, to our own proper use, according to the form of the statute in such case made and provided; whereof the said *Richard* is convicted, as appears to us of record; and have there then, &c.

For an administrator.

To satisfy *John Denn*, administrator of all and singular the goods and chattels, rights and credits, which were of *James Wren*, deceased, who died intestate, for 1000*l.* debt; and also 16*l.* 10*s.* for his damages, which he sustained, as well by occasion of the detaining the said debt, as for his expences and costs, laid out by him about his suit in that behalf, whereof the said *Richard* is convicted, as appears to us of record; and have then there, &c.

If the execution be taken out after judgment on a *sci. fa.* by default, then, after the words, "*whereof*" "*he is convicted, as appears to us of record;*" say,
"And

“ And whereof in our same court, before us, it is
 “ considered, That the said *John* have his execution
 “ against the said *Richard* for the debt and damages
 “ aforesaid, by the default of the said *Richard*, as
 “ likewise appears to us of record; and have you
 “ there then this writ. Witness, &c.”

If by original.

If the action be by original, then you make the writ on a *general return day*, as “ *on the morrow of*
 “ *All Souls, wheresoever we shall then be in Eng-*
 “ *land;*” and add the defendant’s addition as in the pleading.

Testatum.

If the defendant is not to be found in the county where the *venue* is laid, you must then sue out a *testatum*, which is generally done in the first instance (but the *ca. sa.* must issue to warrant the *testatum*; they may be sealed together) 3 *Term Rep.* 388. the form of which is as follows:

Testatum ca. sa.

George, &c. (to the end of the first writ) As appears to us of record, and our said sheriff of *Middlesex*, at a certain day now past, returned to us at *Westminster*, That the said *Richard* was not found in his bailiwick; whereis it is testified in our said court before us, That the said *Richard* lurks and wanders up and down in your county; and have there then this writ. Witness, &c. (pay sealing both writs 1s. 2d.)

N. B. By original say, “ and have you there
 “ this writ;” leave out the word *then*.

Will not lie against peers.

A *capias ad satisfaciendum* lies not against peers of the realm, or their wives (except upon a statute merchant pursuant to stat. of *Acton Burnell*, 11 *Ed.* 1. or statute *staple*, according to 27 *Ed.* 3. or on a recognizance in nature of a statute *staple*, upon 23 *H.* 8. c. 6.). Nor against members of parliament, executors or administrators for the debt of the testator or intestate.

Fieri Facias.

THIS writ was the only writ of execution that lay at common law, and was afterwards confirmed by

by the statute of *West. 2.* It lies as well against privileged persons, peers, members, &c. as other common persons; and against executors or administrators with regard to the goods of the deceased, as for costs awarded against them by false pleading or confession of judgments, if no goods of the testator are to be levied for those costs.

If part only of the debt be levied on this writ, the plaintiff may have a *ca. sa.* for the residue, but he should recite the sheriff's return. 1 *Roll. Abr.* 904. *Cro. Eliz.* 344.

To be ingrossed on a 2s. 6d. stamp parchment, and sealed; and is to issue only in the county where the *venue* is laid. The stationers have them ready printed. If it be into another county, it is called a *testatum*.

There need not be fifteen days between the *Teste* and return of any *ca. sa.* or *fi. fa.* (except against bail or in outlawry). *Stat. 13. Car. 2. c. 2.* s. 7, 8.

If it be sued out in term time, *teste* the writ the first day of the term (although the judgment is not signed till four days after); if out of term, *teste* it the last day of the term. If sued out in term, or vacation.

Rule why *test. fi. fa.* should not be set aside, and the goods restored, plaintiff not having issued a *fi. fa.* to warrant it; the court said, according to the established practice, the want of an original *fi. fa.* was a decisive objection, though the irregularity might be cured by a subsequent production of that writ. Rule absolute. *Brand v. Mears.* 3 *Term Rep.* 388. A *fi. fa.* must be sued out to ground a *testatum*.

N. B. The court will not look at the date of the seal, if it is produced; therefore, before this motion comes on, if it is sued out, it will do, so as it be produced at the time of shewing cause under seal.

By *stat. 29 Car. 2.* the goods are bound only from the time of the delivery of the writ to the sheriff; but lands are bound from the day of the judgment. When goods are bound from.

If all the money is not levied, the writ must be returned before a second execution can be made out, because If all the money is not levied.

because the second is grounded on the deficiency of the first, *Salk.* 318.; and the first sheriff's return must be recited. *Ibid.*

A *fi. fa.* being executed fraudulently, a *fi. fa.* at the suit of another afterwards, shall stand good, and is to be preferred. 1 *Wils.* 44.

Bankrupt.

The defendant had been declared a bankrupt, the certificate had been signed by four parts in five in number and value of the creditors, but not allowed at the time a writ of *fi. fa.* issued. Motion to set it aside. The debt was previous to the bankruptcy; court discharged the rule. *Callen v. Meyrick*, 1 *Term Rep.* 362.

Where two writs delivered,

Where two writs of *fi. fa.* are delivered to a sheriff on different days, and no sale actually made, the first execution must have a priority, even though the seizure was first made under the subsequent execution. *Hutchinson v. Johnson*, 1 *Term Rep.* 729. The goods of the party are bound by the delivery of the writ. Per *Ashhurst* Justice. And if the person claiming under the second execution pay the sheriff the amount of the debt under the first, and takes a bill of sale, the court will not compel the sheriff to refund that money on motion. *Ibid.*

Sheriff who began the execution shall end it.

The sheriff that began the execution shall end it, though he is out of office, *Salk.* 323.; and may sell goods after he is out of his office, without a *venditioni exponas*. Lord *Raym.* 990.

If sheriff returns the want of buyers, how to proceed:

If the sheriff return, That he has levied the goods, and that they remain in his hands for want of buyers, and he continues in office, a *venditioni exponas* issues to make sale thereof, by which he is compelled thereto. If he be out of office before he makes sale, then sue out a *distringas* to compel him to sell the goods, directed to the new sheriff, to distrain the old sheriff to sell; whereby he is compellable so to do; or you may move for issues against him to the value of the goods. 6 *Mod.* 295, 296.

If against one partner.

On a *fi. fa.* upon a judgment against one partner, the sheriff may take the goods of both, and the vendee shall have a moiety in common with the other. *Comb.* 217.

If

If a man died in execution, formerly his executors were no farther chargeable; but now, by *stat.* If defendant dies in execution.

21 *Jac.* 1. c. 24. "though he do die in execution, yet the plaintiff may have an execution against his lands, goods, and chattels."

Execution does not abate by the plaintiff's death; No abatement by plaintiff's death. but the sheriff must go on to execute his writ. *Mod.* *Ca. L. & Eq.* 225. *Salk.* 322. 6 *Mod.* 290.

A landlord is entitled to a year's rent in the case of an execution, without deduction, and the sheriff must take care of him, 8 *Ann.* c. 14. s. 1.; but a ground landlord cannot come in for a year's rent on an execution against an under lessee; for the statute only extends to the immediate landlord, *Str.* 787.; the landlord must give the sheriff notice, or he is not bound. 1 *Str.* 97. Vide 2 *Wils.* 140.

If a plaintiff dies after a verdict, and before the day in bank, though the judgment be right, yet a *fi. fa.* must be awarded, before execution. 1 *Wils.* 302. *Earl v. Brown.* If after verdict, and before day in bank.

If a defendant die after the first day of term, yet plaintiff may have execution against his goods, because the judgment has reference to the first day of the term. *Gilb. Law of Executions*, 46. *Pract. Reg.* 215. So if plaintiff dies after *fi. fa.* sued out, and before returnable, it may be executed. *Cro. Eliz.* 459.

If a *fi. fa.*, *ca. fa.*, or *elegit*, be taken out within the year, and returned and awarded on the roll, the same may be continued from term to term, to the time of the execution thereof, although after the year, and be as effectual as if the judgment had been revived by *scire facias*. *N on R. E.* 5 *Geo.* 2. But a *fi. fa.* must be left with the proper officer, before he will make the entry on the roll, returned by the sheriff. When may be sued without *scire facias*.

Fi. fa. in case.

George the Third, &c.
To the sheriff of Gloucestershire, greeting: We command you, That you cause to be levied of the

Fi. fa. in debt.

George the Third, &c.
To the sheriff of Middlesex, greeting: We command you, That you cause to be levied of the

C c goods

the goods and chattels in your bailiwick of *C. D.* 50*l.* which *A. B.* lately in our court, before us, at *Westminster*, recovered against him, for his damages, which he had sustained as well by means of the not performing certain promises and undertakings made by the said *C. D.* to the said *A. B.* as for his costs and charges by him expended about his suit in that behalf, whereof the said *C.* is convicted, as appears to us of record; and have you that money before us at *Westminster*, on *Monday* next after the morrow of *All Souls*, to render to the said *A. B.* for his damages aforesaid; and have there then this writ. Witness *Lloyd* lord *Kenyon* at *Westminster*, the 13th day of *July*, in the 31st year of our reign. *Stormont* and *Way*.

goods and chattels in your bailiwick of *C. D.* as well a certain debt of 60*l.* which *A. B.* lately in our court, before us, at *Westminster*, recovered against him, as also 63*s.* which in our same court before us were awarded to the said *A. B.* for his damages which he had sustained, as well by occasion of the detaining the said debt, as for his costs and charges by him laid out about his suit in that behalf, whereof the said *C.* is convicted, as appears to us of record; and have you that money before us at *Westminster*, on *Monday* next after the morrow of *All Souls*, to render to the said *A.* for his debt and damages aforesaid; and have there then this writ. Witness, &c.

If after a scire facias, and by default, after the words, "whereof the said C. is convicted, as appears to us of record," say, "And whereof it is considered in our same court, before us, That the said A. have his execution against the said B. of the debt and damages aforesaid, by the default of the said B. as also appears to us of record; and have there then this writ." Witness, &c.

The like in
assault.

If in assault, say, "for his damages which he sustained, as well by reason of a certain trespass and

“ and assault, lately committed by the said C. on
“ the said A. at *Westminster* in your county, as for
“ his costs, &c.”

If in covenant, “ for his damages which he The like in
“ sustained, as well by reason of a certain breach of covenant.
“ covenant made between the said C. and the said A.
“ as for his costs, &c.”

For his damages, which he sustained as well by The like in
reason of a certain trespass and ejectment committed ejectment.
against the said A. by the said C. at E. in your
county, as for his costs, &c.

Testatum, si. fa. in case.

George, &c. To the
sheriffs of *London*, greet-
ing: We command you,
That you cause to be
levied, &c. *(to the end of*
the si. fa.) damages afore-
said: And our sheriff of
Middlesex, at a certain
day now past, returned
to us at *Westminster*,
that the said C. had not
any goods or chattels in
his bailiwick, whereof
he could cause to be le-
vied the damages afore-
said, or any part thereof:
Whereas it is testified in
our same court, before
us, that the said C.
hath sufficient goods and
chattels in your baili-
wick, whereof you may
cause to be levied the
damages aforesaid, and
every part thereof; and
have you there then this
writ. Witness, &c.

Testatum si. fa. in debt.

George, &c. To the
sheriff of *Middlesex*,
greeting, &c. *(to the end*
of the si. fa.) damages
aforesaid: And our she-
riffs of *London*, at a cer-
tain day now past, re-
turned to us, that the said
C. had not any goods or
chattels in their baili-
wick, whereof they could
cause to be levied the
debt and damages afore-
said, or any part there-
of: Whereas it is testified
in our same court before
us, that the said C. hath Testatum part.
sufficient goods and chat-
tels in your bailiwick,
whereof you may cause
to be levied the debt and
damages aforesaid, and
every part thereof; and
have you there then this
writ. Witness, &c.

Cc 2

N. B. If

If by original.

N. B. If the proceedings be by *original*, add the defendant's addition as in the declaration; at the foot of the execution say, *and have there this writ*, and make it returnable on a *general* return day, as on the morrow of *All Souls*, wheresoever we shall then be in *England*.

Testatum for residue.

If there is a levy on the *fieri facias*, and it be necessary to have a *testatum* for the residue, you must recite the first *fi. fa.* and sheriff's return thereon, and then command the sheriff to levy the residue. *Salk. 319. Oviat v. Vyner.*

A Non omittas fi. fa.

Fi. fa. for the residue in debt.

George, &c. To the sheriff of *Norfolk* greeting: We command you, That you omit not, by reason of any liberty in your bailiwick, but that you enter the same, and cause to be levied of the goods and chattels in your bailiwick of *C. D.* (*the same as a fi. fa.*)

Testatum fi. fa. into *Durham*, in case.

George, &c. To the Right Reverend Father in God, — by divine Providence lord bishop of *Durham*, greeting: We command you, that by our writ, under the seal of your bishoprick duly to be made, and to the sheriff of the county of *Durham* to be directed, you command him, that
of

George, &c. greeting: Whereas (*to the end of the first fi. fa.*); and you at that day returned to us, That by virtue of that writ to you directed, you had caused to be made of the goods and chattels of the said *C.* in your bailiwick the sum of 40*l.* part of the debt and damages in the said writ mentioned; which money you had ready on the day and at the place in the writ mentioned, as by the said writ you was commanded; and that the said *C.* had not any other, or more goods or chattels in your bailiwick, whereof you could cause to be levied the residue of the said debt and damages, or any part thereof; therefore we command you, that you cause to be levied

of the goods and chattels of *C. D.* in his bailiwick, he cause to be made 50*l.*; which *A. B.* lately in our court before us, at *Westminster*, recovered against him, for his damages, which he had sustained, as well by means of the not performing certain promises and undertakings, lately made by the said *C.* to the said *A. B.* as for his costs and charges by him laid out about his suit in that behalf, whereof the said *C.* is convicted as appears to us of record; and have you the said money before us at *Westminster*, on *Monday* next after the morrow of *All Souls*, to render to the said *A. B.* for his damages aforesaid: And our sheriff of *Middlesex*, at a certain day now past, returned to us, That the said *C.* had not any goods or chattels in his bailiwick, whereof he could cause to be levied the damages aforesaid, or any part thereof: Whereas it is testified in our same court, before us, That the said *C.* hath sufficient goods and chattels in your county palatine, whereof the sheriff of your county

vied of the goods and chattels of the said *C.* in your bailiwick, 63*l.* 3*s.* residue of the said sum of 103*l.* 3*s.* which the said *A.* recovered against him in our said court, before us, for his said debt and damages; and have you that money before us, at *Westminster*, on *Monday* next after the morrow of *All Souls*, to render to the said *A.* for the residue of the said debt and damages; and have you there then this writ. Witness, &c.
Fi. fa. de bonis ecclesiasticis, in debt.

George, &c. To the Right Reverend Father in God —, by divine Providence lord bishop of *Lincoln*, greeting: We command you, That of the ecclesiastical goods of *C. D.* late of &c. clerk, in your diocese, you cause to be levied 1000*l.* for a debt which *A. B.* in our court, before us, at *Westminster*, recovered against him; as also 63*s.* which were adjudged to the said *A. B.* in our same court before us, for his damages, which he had sustained, as well by occasion of the detaining that debt, as

county palatine may for his costs and charges
cause to be levied the by him laid out about
damages aforesaid, and his suit in that behalf,
every part thereof; and whereof the said C. is
have you there then this convicted, as appears to
writ. Witness, &c. us of record, and have

you the said monies
before us at *Westminster*, on *Monday* next after
the morrow of *All Souls*, to render to the said A. B.
for his debt and damages aforesaid: And our sheriff
of *Middlesex*, on ——— next after three weeks of
the *Holy Trinity* last past, returned to us at *West-*
minster, that the said C. D. had not any goods or
chattels, or any lay fee in his bailiwick, whereof he
could cause to be levied the debt and damages aforesaid,
or any part thereof; and that the said C. D.
is a beneficed clerk, to wit, rector of the parish and
parish-church of *W.* in the county of *B.* in the
diocese of *Lincoln*; and have you there then this
writ. Witness, &c. This writ is to be sealed,
pay 7*d.* and sent to the register of the diocese, who
will make out a sequestration, the plaintiff first
giving security by bond to the bishop.

Fi. fa. in case against an administratrix, where she confesses the debt of the testator, or on a recovery. *The like against an administratrix in debt.*

George, &c. We command you, that you
cause to be levied of the
goods and chattels in
your bailiwick, which
were of C. D. at the time
of his death, in the hands
of E. administratrix of
all and singular the goods
and chattels, rights and
credits, which were of
the said C. deceased, at
the

George, &c. We command you, that of the
goods and chattels in your
bailiwick which were of
C. D. at the time of his
death, in the hands of E.
widow, administratrix of
all and singular the goods
and chattels, rights and
credits, which were of the
said C. at the time of his
death, who died intestate,

the time of his death, who died intestate, to be administered 40*l.* which *A. B.* lately in our court, before us at *Westminster*, recovered against the said *C.* administratrix as aforesaid, for his damages, costs, and charges, which he had sustained by reason of the non-performance of certain promises and undertakings made by the said *C. D.* in his life-time, to the said *A.* whereof the said *D.* is convicted, as appears to us of record, if she hath so much thereof in her hands to be administered; and if she hath not so much thereof in her hands to be administered, then that you cause to be levied 6*l.* 10*s.* being the costs and charges of the said *A.* and parcel of the damages aforesaid, of the proper goods and chattels in your bailiwick of the said *E.* administratrix as aforesaid, and have that money before us at *Westminster*, on *Monday* next after the morrow of *All Souls*, to render to the said *A.* for his damages aforesaid; and have there then this writ. Witness, &c.

to be administered, you cause to be levied as well a certain debt of 530*l.* which *A. B.* lately in our court, before us, at *Westminster*, recovered against the said *E.* administratrix as aforesaid; as also 16*l.* which in our said court before us were adjudged to the said *A.* for his damages, costs, and charges, which he had sustained, by means of detaining the said debt, whereof the said *E.* is convicted, as appears to us of record, if she hath so much thereof in her hands to be administered, and if she hath not so much thereof in her hands to be administered; then that you cause to be levied the damages aforesaid, of the proper goods and chattels in your bailiwick, of the said *E.* administratrix as aforesaid; and have you that money before us, at *Westminster*, on *Monday* next after the morrow of *All Souls*, to render to the said *A.* for his debt and damages aforesaid; and have you there then this writ. Witness, &c.

N. B. If it be against an executor, add the words,
“ Executor of the last will and testament of *A. B.*
“ deceased.”

Fi. fa. for defendant's costs.

George, &c. We command you that you cause to be levied of the goods and chattels of *A. B.* in your bailiwick *14l. 10s.* which were awarded to *D. E.* in our court before us at *Westminster*, according to the form of the statute in such case made and provided, for his costs and charges by him expended in and about his defence, in a certain plea of trespass on the case (*as the action is*), prosecuted in our said court before us by the said *A.* against the said *D.*; and have you that money before us at *Westminster*, on *Monday* next after the morrow of *All Souls*, and have you there then this writ. Witness, &c.

For Costs on a Nonsuit.

George the third, &c.
To the sheriff of *Middlesex*, greeting: We command you, that you cause to be levied of the goods and chattels in your bailiwick of *A. B.* *14l.* which were awarded to *C. D.* in our court, before us at *Westminster*, according to the form of the statute in such case made and provided, for his expences and costs, which he has been put to by reason of the false claim of the said *A.* in a certain plea of trespass on the case prosecuted in our said court before us, by the said *A.* against the said *C.*; and have you that money before us at *Westminster*, on, &c. Witness, &c.

said; which said goods

Venditioni exponas.

George, &c. To the sheriff of *Middlesex*, greeting: Whereas we lately commanded you, that you should cause to be levied of the goods and chattels of *C. D.* *50l.* which *A. B.* lately in our court, before us at *Westminster*, recovered against him for a debt; and also *63s.* which, &c. (*here recite the writ verbatim*); and that you should have that money before us, at *Westminster*, on, &c. to render to the said *A.* for his debt and damages aforesaid: And you at that day returned to us at *Westminster*, that you had levied of the goods and chattel of the said *C.* to the value of the debt and damages aforesaid and chattels remained in

in your hands for want of buyers: Therefore we being desirous that the said *A.* be satisfied his said debt and damages, command you that you sell or cause to be sold, the said goods and chattels, and every part thereof, for the best price that can be got for the same, at least for the debt and damages aforesaid: so that you have that money arising from such sale, before us at *Westminster*, on, &c. to render to the said *A. B.* for his debt and damages aforesaid; and have there then this writ. Witness, &c.

This writ is to be signed by Messrs. *Provost* and *Webb*, pay *1s. 8d.* seal *7d.* a *præcipe* is to be made for the office.

Elegit.

THIS is a judicial writ, given by the statute of *Elegit*, *West. 2. 13 Ed. 1. c. 18.* either upon a judgment for a debt, or damages; or upon the forfeiture of a recognizance taken in the king's court. If the goods are not sufficient, then the moiety, or one half of his freehold lands, which he had at the time of the judgment given, whether held in his own name, or by any other in trust for him, are also to be delivered to the plaintiff to hold, till out of the rents and profits thereof the debt be levied, or till the defendant's term be expired, as till the death of the defendant, if he be tenant for life or in tail. This execution, or seizing of lands by *elegit*, is of so high a nature, that after it the body of the defendant cannot be taken. A term of years may either be extended or sold, as part of the personalty. *8 Co. 171.* A rent charge may be extended. *Moor 32.* So may lands in ancient demesne. *Hob. 47.* But a rent seck, or copyhold lands, cannot. *Cro. Eliz. 650. 3 Co. 9.*

If the lands are extended upon an *elegit*, the plaintiff is for ever barred from having another execution; but if he levies on the goods only, upon the *elegit*, and the sheriff return *nihil* as to the land,
If no lands are extended, a *ca. sa.* may issue.
a *ca.*

a *ca. fa.* may issue for the residue against the defendant: for the election cannot be complete, unless the plaintiff has some benefit from the land, for the taking out the writ is not an actual election, but only in order to an election; and if there be no lands, there is nothing to chuse, and consequently no election; where there are no lands an *elegit* is no more in effect than a *fieri facias*. *Hob. 58. Str. 226. Bacon v. Peck.* And so may a *fi. fa.* issue for the residue, if no lands be extended.

Sheriff's duty.

Upon an *elegit* the sheriff is to impanel a jury (but no notice thereof is given to the other side), who are to make inquiry of all the goods and chattels of the debtor, and to appraise the same, and also to inquire as to his lands and tenements, and upon such inquisition, the sheriff is to deliver all the goods and chattels (*except the beasts of the plough*), and a moiety of the lands, to the party, and must return his writ, in order to record such inquisition. 2 *Inst.* 396.

The sheriff does not put the plaintiff in possession; therefore, in order to recover, he must bring an ejectment.

If the sheriff finds goods, he may deliver them to the plaintiff by appraisement. *Ld. Ray. 346.*

Elegit in debt.

George the third, &c.

To the sheriff of Kent,
greeting: Whereas *A. B.*
lately in our court, be-
fore us at *Westminster*,
by bill, without our
writ, and by the judg-
ment of the same court,
recovered against *C. D.*
as well a certain debt of
100*l.* as also 6*3s.* which
in our said court before
us were adjudged to the
said *A.* for his damages,
which

Elegit in case.

George the third, &c.

To the sheriff of Kent,
greeting: Whereas *A. B.*
lately in our court, be-
fore us at *Westminster*,
by bill, without our writ,
and by the judgment of
the same court, recovered
against *C. D.* 100*l.*
which in our said court
before us were adjudged
to the said *A.* as well for
his damages, which he
had sustained by means
of

To be signed by
Mr. Webb;
pay 1*5s.* 8*d.*
1*st* of 7*d.*; to be
ingrossed on a
2*1s.* 6*d.* stamp
parchment; a
præcipe is to be
made for the
office.

which he had sustained by means of the detaining of the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said *C. D.* is convicted, as appears to us of record, and because

of the non-performance of certain promises and undertakings made by the said *C.* to the said *A.* as for his costs and charges by him laid out about his suit in that behalf, whereof the said *C.* is convicted, as appears to us of record, and because

the said *A. B.* came into our court before us, and chose to have delivered to him all the goods and chattels of the said *C. D.* (*except the oxen and beasts of his plough*), and likewise a moiety of all and singular the lands and tenements of the said *C. D.* in your bailiwick, to hold to him and his assigns, as his free tenement, according to the form of the statute in such case made and provided, until he shall thereof have levied the said debt and damages; *Damages.* therefore we command you, that without delay, you cause to be delivered to the said *A.* by reasonable price and extent, all the goods and chattels of the said *C. D.* in your bailiwick (*except the oxen and beasts of his plough*), and likewise a moiety of all the lands and tenements of the said *C. D.* in your bailiwick, of which the said *C. D.* on the day of *(the day the judgment was signed)*

in the thirty-first year of our reign (on which day the judgment was given), was, or at any time since hath been seised to him the said *A.* to hold to him the said goods and chattels, as his own proper goods and chattels, and also to hold to him and his assigns, a moiety of the said lands and tenements as his own free tenements, according to the form of the said statute, until he shall thereof have fully levied the said debt and damages: *Damages.*

And in what manner you shall have executed this our writ, make appear to us at *Westminster*, on *Monday* next after the morrow of *All Souls*, under your seal, and the seals of them by whose oath you shall

shall make the said extent and appraisement; and have there then this writ. *Witness, &c.*

May award on the roll *elegits*.

A man may award on the roll as many *elegits* as he pleases, and execute all, or any, at his pleasure; but it is said, if he awards an *elegit* in one county, extends the lands upon the writ, and afterwards files it, he is barred, and cannot sue out an *elegit* into another county; but an *actual writ* must be sued out, returned, and filed, before an award can be entered on the roll.

What proof is necessary to support an ejectment on an *elegit*.

If on an *elegit* it is found, that the plaintiff was seised of the lands, at the time the judgment was given; upon an ejectment (which must be brought to recover the possession), the plaintiff need only give in evidence the office copy of the judgment, *elegit*, return, and inquisition thereupon filed, and is not bound to prove the party seised at the time of the judgment; if he was not seised, it must be proved by the other side. *Gilb. L. of E.* 10. *Vide Salk.* 563. *Ld. Ray.* 718.

If an *elegit* be returned that there are no lands, the sheriff need not return an inquisition; for the use of that is only to deliver a moiety of the lands by, if there are any. *Str.* 874. *Stonehouse v. Ewen.*

Not bound to deliver a moiety of each particular.

The sheriff is not bound to deliver a moiety of each particular tenement and farm, but only certain tenements, &c. making in value a moiety of the whole. *Den v. Earl of Abingdon.* *Dougl. Rep.* 473. *Vide Brooke's Abr.* title *Elegit.* *Plow.* 14. 1 *Salk.* 563. 1 *Sid.* 91. *Cro. Car.* 319. *Mr. J. Buller.* It is agreed that the moiety extended must be set out by *metes and bounds*: I take the meaning to be, a moiety in value; which is ascertained by the jury. *Dougl.* 476.

Judgment by Default.

Judgment by default.

IF the defendant does not plead *within the time* allowed by *the rules of the court*, or confesses the action, the plaintiff may sign judgment against him by

by default; and this judgment is either *interlocutory* or *final*. So if the defendant make default in re-joining, returning the paper or demurrer book, and paying for the entries, or for the issue, or in any other stage of the proceedings, the time for doing the act being expired.

Interlocutory judgments are those incomplete judgments, whereby the right of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained, which is the province of a jury. Therefore, if the action be in *case*, *trespass*, or the like (*and where it only sounds in damages*), the judgment is *interlocutory*, and there must be a writ of inquiry issued, directed to the sheriff of the county where the action is laid, to inquire by a jury what damages the plaintiff hath sustained, who is to return the inquisition to the court; whereupon the plaintiff's attorney taxes his costs, and signs final judgment; but if the plaintiff declares in debt, as on bond for a sum certain, or in any action wherein the *specific thing* sued for is recovered, the judgment is *absolutely complete*, and is called a *final judgment*. Definition.

First enter on a roll (which you get of Messrs. *How to sign an* *Provoost* and *Webb* at the King's Bench office) warrants *interlocutory* of attorney for the plaintiff and defendant, make also judgment. a memorandum thereon *of the term in which the declaration was delivered or filed*, then take a treble-penny stamp paper, and enter *only the memorandum thereon*, which take to the clerk of the judgments in the King's Bench office, he will sign the same, pay 4*d.* per sheet, and 8*d.* filing the warrants of attorney. If the action be in debt, enter the judgment on a double half-crown stamp paper, make your entry *If in debt, judgment final.* on the roll as before, tax the costs with the master, and take out execution.

A regular interlocutory judgment may be set aside, so as to let in the defendant to try the merits of his case; but it must be on payment of costs, and such merits likewise must appear upon an affidavit. *Str.* 823. 1242. 1 *Burr.* 568. A writ of inquiry was set aside, and defendant let in to plead a fair plea on payment

payment of costs. *Salk.* 518. 6 *Mod.* 191. But as the rule is conditional, take care to pay the costs forthwith.

Irregular judgment may be set aside.

If plaintiff sign an interlocutory judgment irregularly, the court will set it aside upon an affidavit of the facts, in which affidavit "*shew the writ having issued, the delivery of the declaration, and the time when the rule to plead expired; or if you were upon terms of accommodation, shew the special matter, and the advantage taken;*" and as it is a rule to shew cause, no notice of motion is necessary.

Twenty four hours.

Judgment may be signed for want of a plea at any time after twenty-four hours from the time of the plea demanded: but the rule must be expired, and the day exclusive. *Term Rep.* 454. 1 *V. Dyche v. Burgoyne.* Plaintiff may sign judgment if defendant plead in abatement *after the four days*, though no rule to plead is given. *Ibid.* 586. *Brandon v. Payne.*

When no demand.

There is no need to demand a plea afresh after a judge's order, but after it is expired, sign judgment, if no plea.

To be paid for.

If declaration is left in the office *de bene esse*, and notice given, defendant must take it out, and pay for it, or plaintiff may refuse his plea, and sign judgment. 1 *Wils.* 173. *Keeling v. Newton.* Order for two days judgment cannot be signed till the third day in the afternoon.

If defendant pleads a judgment recovered after a judge's order.

If defendant pleads a judgment recovered in another court after a judge's order to plead issuably, you may sign judgment, because it is not such an issuable plea as is required by the order.

A sham demurrer after a judge's order is not an issuable plea; but a real demurrer is. 3 *Burr.* 1788. *Gray v. Ashton.*

When no occasion to enter a *nolle prosequi*.

There were four counts in the declaration, *non assumpsit* pleaded to three, and a demurrer to the fourth. After judgment on the demurrer, the plaintiff takes out a writ of inquiry and executes it: the demurrer being determined, the court held the judgment regular, and that there was no occasion for a *nolle prosequi* to be entered on the roll as to the three counts, until he enter final judgment. *Str.* 532.

Inquiry.

Inquiry.

GENERALLY it is laid down, where damages are to be recovered, a jury must be called in to assess them; unless the defendant, to save charges, will confess the whole damages laid in the declaration; otherwise the entry of the judgment is, “*that the plaintiff ought to recover his damages, because the court know not what damages the plaintiff hath sustained; therefore the sheriff is commanded by the oaths of twelve honest and lawful men to inquire into the said damages, and return such inquisition into court.*” This process is called a writ of inquiry: in the execution of which, the sheriff sits as judge, and tries by a jury subject to nearly the same law and conditions as the trial by jury at *nisi prius*, what damages the plaintiff hath really sustained, which must assess some damages; the sheriff (on the fourth day after the return of the writ) delivers to the plaintiff’s attorney his return, with the inquisition annexed; previous to which, *viz.* on the *return day* of the inquiry, there should be a rule for judgment given with the clerk of the rules, as hereafter.

In like manner, when a demurrer is determined for the plaintiff upon an action wherein damages are recovered, the judgment is also incomplete, without the aid of a writ of inquiry.

Where there is no necessity for this Writ.

The court have now determined where the action is on a bill of exchange or promissory note, they will on motion refer it to the master, to see what is due for principal, interest, and costs, without the execution of a writ of inquiry. *Shepherd v. Charter.* 4 Term Rep. 275.

Buller J. Writs of inquiry are often sued out in cases where they are not necessary; as for instance, in an action on covenants for the payment of a sum certain.

Actions on bills
of exchange, &c.
no need of in-
quiry.

tain. 2 *Saund.* 106. It does not follow, because a writ of inquiry has been awarded, that the amount of the demand is uncertain. In actions on bills of exchange or promissory notes, nothing but the instrument is to be proved before the jury, the sum being thereby ascertained. *Tbelluffon v. Fletcher.* *Dougl.* 316.

When necessary. But where the demand is *not certain upon the record*, a writ of inquiry must issue, as in trespass. *Yel.* 152. So in trespass on the case, replevin, &c. 3 *Lev.* 213. *Lut.* 213. 211.

Where it need not issue. If one defendant pleads to issue, and the other makes default, a writ of inquiry is awarded to prevent a discontinuance, but does not issue; for the jury which tries the issue, must assess the damages. 1 *Lev.* 141. 11 *Co.* 6. a. *Heydon's case.* Yet there may be a writ of inquiry though issue is joined, where the plaintiff is nonsuited. 5 *Mod.* 77. 118. 1 *Salk.* 205. *Skin.* 595.

Want of inquiry aided. The want of a writ of inquiry is aided by the statute of jeofails. *Str.* 878. *Malleroy v. Jennings.*

Defendant may have this writ. Where damages are given to an overseer, defendant, on a verdict for him, a writ of inquiry shall issue, *Str.* 1021.; and a suggestion shall be entered on the roll for that purpose. *Rep. Temp. Hard.* 139.

Notice of inquiry. When judgment is signed, give notice of executing the writ of inquiry, and eight days exclusive is sufficient in all cases, except causes in *London* and *Middlesex* where the defendant lives above 40 computed miles from *London*, then 14 days notice must be given; and likewise except causes wherein no proceedings have been had within 4 terms, then a term's notice must be given: But if the proceedings have been staid by injunction for 4 terms, a term's notice is not necessary. *N. on R. M.* 4 *Ann.* (c).

A defendant resided upwards of 40 miles from *London*, but pending the action, removed his habitation nearer, it was held, that 8 days were sufficient.

Inquiry on judgment or demurrer, &c.

By the course of the court, the defendant ought to have eight days notice exclusive of executing a writ of inquiry, as well upon a judgment given on demurrer,

mu
of
Str.
befor
left
R.
In
the
give
and

murther, as upon a judgment given by default, inquiry of assets, &c. *Sty. Praet. Reg.* 369. title Notice.

Sunday is to be accounted as one, if it be not the Sunday, day on which the notice is given. *Mod. Caf. L. & E.* 21.

There must be the same notice in executing a *Sci. fi.* inquiry, *scire fieri* writ of inquiry, as a common writ of inquiry. *Str.* 235. 623.

If an attorney has appeared, there must be notice given to him; if not, to the defendant, or left at his last place of abode. Notice to attorney if he appears.

If a writ of inquiry be set aside for irregularity, there must be a new writ ingrossed. *Hil. 13 Geo. 1. Cole v. Vaughan. MS. Rep.*

If the jury mistake in point of law, or give too small damages, the court will, on payment of costs, order a new writ, *Str.* 425. 1259.; but this must be on special application. When a new inquiry will be ordered.

An inquiry executed on the day of the return is good. *Ld. Raym.* 1449. Inquiry executed on return day, good.

Plaintiff became bankrupt between the *interlocutory* and *final* judgment, and sued out the execution in his own name. Rule to discharge defendant. The court said, the bankruptcy of the plaintiff did not abate the suit; and that they had in several instances permitted the assignees to continue a suit commenced by a bankrupt in his name. *R. disch. Waugh v. Austen. 3 Term Rep.* 437. The plaintiff may go on although he be bankrupt.

Where a term's notice of trial is required, there must at the same distance of time be the like notice of executing a writ of inquiry. *Peyton v. Burdus, Str.* 1100. And such notice must be delivered before the *essoign* day. Term's notice.

If in London and Middlesex, the inquiry is to be left at the sheriff's office, the day before the execution. *R. Hill. 23 Geo. 3.* Inquiry to be left the day before.

In every case where the plaintiff shall conclude to the country upon the defendant's plea, and shall give notice of trial of the issue upon the paper book, and thereupon the defendant, to hinder the trial of the Where plaintiff concludes to the country on defendant's plea, and gives notice

of trial on the book, the same notice shall serve for inquiry after judgment on demurrer.

the issue, shall demur in law, upon the replication, or plea of the plaintiff, and the plaintiff shall join in such demurrer, and thereupon shall obtain judgment, the attorney for the defendant shall be obliged to accept of notice of *executing a writ of inquiry of damages*, from the time of notice of trial given upon the paper book; but then the plaintiff ought to give notice of the hour and place of executing the inquiry. *R Hil. 8 Geo. 1.*

Notice of executing inquiry.

Take notice that a writ of inquiry of damages in this cause, will be executed on *Friday the 25th day of November* instant, between the hours of ten and twelve of the clock in the forenoon of the same day, at the *secondaries office*, No. 10, *Grocer-hall court*, London. Dated the 17th day of November 1791.

Yours, &c.

J. K. plaintiff's attorney.

To Mr. C. D. attorney for defendant.

If in *Middlesex*.

If it is in *Middlesex*, and in term time, say, "at the King's Arms Tavern, Palace Yard, Westminster, in the county of Middlesex;" if in vacation, "at the sheriff's office in Took's Court, Curfitor Street, Chancery Lane, in the county of Middlesex."

If in the country.

If in the country, say, "will be executed at the house of L. W. commonly called or known by the name or sign of the in the High Street, Oxford, in the said county."

What notice to express.

The notice should express the name of the house, the county, town, and street, and the time between hour and hour must not be above two; and notice to execute by ten uncertain. *Str. 1142. Ison v. Fowen.*

Countermand.

If you do not intend executing the inquiry on the day, you may countermand same, by giving notice thereof: And when *eight days* notice is sufficient for the execution, *two days* countermand will do; but where *fourteen days* notice is requisite for the execution, then there must be *six days* notice of countermand.

A notice

A notice of inquiry may be continued over to another day, but not more than once in a term. *Str.* 1119. *Green v. Gifford.* You may continue two days before it is executed to any other day.

I do hereby countermand the notice of executing the writ of inquiry given you in this cause. Dated, *Str.* Notice of countermand.

I do hereby continue the notice of executing the writ of inquiry given in this cause to the day of next, when the same will be executed between the same hours, and at the same place. Dated, *Str.* Notice of continuance.

Costs may be recovered for not executing a writ of inquiry, the same as for not going to trial. *Str.* 728. *Sutton v. Bryan.* And the court said, it was as reasonable, as in case of a trial. *Ibid.* Costs.

George the third, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, &c. To the sheriffs of London, greeting: Whereas *John Denn*, lately in our court before us at *Westminster*, by bill without our writ, impleaded *Richard Fenn*, being in the custody of the marshal of our *Marshalsea* of our lord the now king, before the king himself: For that whereas (set forth the whole declaration *verbatim*) to the said *John*, his damage of 100*l.* as he saith, and such proceedings were thereupon had in our said court before us, that the said *John* ought to recover his damages by means of the premises; but because it is unknown to our court before us, what damages the said *John* hath sustained by means of the premises; therefore we command you, that by the oath of twelve good and lawful men of your bailiwick, you diligently inquire what damages the said *John* hath sustained, as well by means of the premises aforesaid, as for his costs and charges by him about his suit in this behalf expended, and make appear to us at *Westminster*, on Friday in fifteen days of *St. Martin*, the inquisition which you shall thereupon take under your seal, and the seals of those by whose oath you shall take that inquisition, and have there then this writ. Wit-

ness *Lloyd lord Kenyon*, at *Westminster*, the 7th day of *November*, in the thirty-second year of our reign.
Stormont and Way.

How to be engrossed.

To be engrossed on a 2s. 6d. stamp parchment, and only sealed, pay 7d. leave it at the sheriff's office for execution, first indorsing on it the day it is to be executed; pay in *London* 1l. 9s. 4d. if no witnesses, and 4d. for every witness; in *Middlesex* 1l. 10s. 4d. other counties 1l. 11s. 6d. attend the execution on the day. On the day you attend the sheriff's deputy and the jury, with evidence to prove the plaintiff's demand, or damages sustained, and the defendant is at liberty to produce witnesses in mitigation, for the jury must give some damages.

Interest on note, &c.

The jury may give interest on a note, bill of exchange, and money lent; and a promissory note need not be proved but produced, to see if any money is indorsed as paid off. *Str.* 1149. 3 *Wils.* 155. Defendant shall not give in evidence fraud, for he admits the contract as declared. *Str.* 612. For goods sold, work done, money paid, lent, had and received, you must give evidence.

Evidence necessary.

Rule for judgment.

On the day of the return, give a rule for judgment at the clerk of the rules, naming your cause on a slip of paper, and writing on it, "Rule for judgment on inquiry," pay 1s. 10d. It expires in four days next after it is given. Sunday (or any holiday on which the court does not sit) is not reckoned a day: it may be entered at any time within four days after the term, *N. on R. E.* 5 *Geo.* 2. but Sunday is no day. They must be four full court days, a *dies non* is excluded. Get inquisition from the sheriff, carry it to the stamp-office, and stamp it with a double 2s. 6d. stamp, tax the costs with the master, pay 2s. 6d. and defendant may have a rule from the clerk of the rules to be present, if he thinks fit; pay 4s. 6d. a copy of which is to be served on the attorney; after this plaintiff may take out execution, if served with no allowance of a writ of error.

If

If the witnesses will not voluntarily attend the execution, the party wanting their testimony may make out a *subpæna*, which is as follows :

George the third, &c. to (here insert the witnesses *Subpæna on inquiry* names, there may be four in each writ,) We com-

mand you, and every of you, that setting aside all and singular businesses and excuses whatsoever, you, and every one of you, be and appear in your proper persons, before our sheriff of the county of *Middlesex*, on the day of next, at the sheriff's office in *Took's Court, Castle Yard*, in the county of *Middlesex*; (if in *London* say) before our sheriffs of our city of *London*, at their office in *Grocers-hall Court*, in the *Poultry, London*; if in the country, say, before *A. P. Esq* our sheriff of the county of *Oxford*, at the house of commonly called or known by the name or sign of the

in the said county of *Oxford*, (in the said county) the truth of all and singular those things, according to the best of your information and knowledge, which you, or any of you know, in a certain cause now depending in our court before us, between *A. B.* plaintiff, and *C. D.* defendant, of a *plea* on the case (as the action is) on the part of the plaintiff, on which our certain writ of inquiry of damages hath been sent by us, out of our said court, and directed to our said sheriff, then and there in due form of law to be executed; and this you, nor any of you, shall in no wise omit, under the penalty of 100*l.* Witness *Lloyd lord Kenyon* at *Westminster*, the 7th day of *November* in the 32d year of our reign.

Stormont and Way.

This must be ingrossed on a 2*s.* 6*d.* stamp piece of parchment. It must be signed by Messrs. *Provost and Webb*, and sealed; pay signing 1*s.* 8*d.* seal 7*d.* serve your witnesses with a copy, pay 1*s.* each, and make a note for the office thus :

London, to wit, *subpæna* to testify on inquiry between *A. B.* plaintiff, and *C. D.* defendant, on the part of the plaintiff. *Præcip.*

J. K. Attorney.

D d 3

N. B.

N. B. If either party attend by counsel, notice must be given, or will not be allowed in costs.

Confession of the Action.

Cognovit.

Take it in
double the
debt.

As this is set-
tled, there need
no 6s. stamp.

In order to prevent the execution of a writ of inquiry, &c. frequently the defendant (to save the costs) confesses the action, or his attorney does it for him, with a stay of the execution, which confession is generally wrote in the margin of the declaration, or it may be done on plain paper thus; *I confess this action; and that the plaintiff hath sustained damages to the amount of 20l. besides his costs and charges to be taxed by the master; and no judgment shall be entered up, or execution issue until the 12th day of November next, in default of payment of the sum of 10l. being the debt in this action. And that no writ of error shall be brought, nor any bill in equity filed: and that in case the plaintiff shall enter up his judgment, he shall be at liberty to levy the said 10l. together with all costs, sheriff's poundage, and all other fees. As witness my hand, &c.*

If the confession be in an action of debt, then it may be, "*I hereby confess the debt in this cause, and that the plaintiff hath sustained damage to the amount of 1s. besides his costs and charges, to be taxed by the master, to be paid as follows, &c.*" as above.

How to sign
judgment after
confession.

If the confession is, that the judgment shall be entered up, sign it on a double half crown stamp paper, as it is final; but you do not pay for the entries a-new, nor is there occasion for a new roll, pay 2s. 6d. for the secondary's fee, and 6d. for the further entry of the judgment, and make the entry on the judgment paper only as far as the end of the memorandum.

Inquiry

Inquiry before the Chief Justice, &c.

THERE are cases upon which application may be made to the court to have the writ of inquiry executed before the chief justice at the sittings, or before the justices of assize; but leave is seldom granted, unless the case is very special, as where the law is mixed with the fact, or it appears to be of too much consequence for the sheriff to undertake, in which case, the jury set their hands and seals to their verdict; and, upon the trial, the judge of *nisi prius* is only an assistant to the sheriff, and has no judicial power; and if the parties come to an agreement at the trial, the judge is to sign it, and afterwards the court may be moved to have it made a rule of court. 12 Mod. 519. 610.

Writ of inquiry
before the chief
justice.

The way to apply is, to make affidavit, *setting forth the circumstances of the parties, plaintiff and defendant, and the nature of the action*, on which the court will grant a rule to shew cause, and in case of success, the rule will be for the sheriff to summon a good jury. But I do not think there can be a special jury in this case granted, if contested; and at all events if there be one granted, yet defendant has no right to pay for it.

How to apply.

If the rule is made absolute, a common writ of inquiry directed to the sheriff is made out; and the notice ought to be for the sittings or assizes generally, and not for any particular day. Barnes 135.

The writ of inquiry is sent to the sheriff, with the rule to summon a good jury thereon, and you enter the cause with the marshal the same as a record, and pay the same fees; the sheriff returns the inquisition as usual, and takes his fees as usual; give a rule for judgment on the return day, and proceed as before.

By consent, in vacation, an order may be had from a judge to execute an inquiry before the judge of assize, and he will make such order for the clerk of the rules to be at liberty to draw up a rule for that purpose, on producing counsel's hand.

By consent an
order may be
had in vacation.

Mr. Justice Buller granted an order to execute a writ of inquiry in an action of covenant without an affidavit, where some legal knowledge was necessary, and the damages went for was about 600*l*. Trin. Vac. 1791.

It may be adjourned.

If executed before the chief justice, it may be adjourned to the next sitting; but if on account of a witness, the plaintiff must pay costs. Str. 853. *Coleman v. Mawbey*.

Retraxit.

IT is very common *after pleaded* to confess the action; in this case, in the confession it is necessary to add, that defendant consent to withdraw his plea, and that plaintiff may take judgment, in order that a *retraxit* may be entered by the master, who will not do it unless the attorney for the defendant be present. Enter all the pleadings on the roll, with the relinquishment of the defendant's plea; take same to the clerk of the judgments, who will enter them, and sign the judgment on a double 2*s*. 6*d*. stamp, then go to the master, and he will enter the *retraxit* in the margin of the roll, but the entry on the roll must be complete.

Formerly it could not be done if defendant did not appear in person. 2 *Cro.* 211. 8 *Co.* 586. 1 *Salk.* 89.

Entering Judgment on Warrant of Attorney.

IT happens frequently, that after the defendant is arrested and proceeded against, the plaintiff, in order to prevent further litigation, accepts a warrant of attorney for his demand, with a defeazance payable by instalments; if it so happen, and the defendant be in custody, the following rule must be observed:

No bailiff, &c. to take any warrant to acknow-

It is ordered, by the court, That no bailiff, nor sheriff's officer, shall presume to exact or take

take from any person, being in his custody by arrest, any warrant to acknowledge a judgment, but in the presence of an attorney for the defendant, which attorney shall then subscribe his name thereunto; which said warrant shall be produced when the said judgment shall be acknowledged. And if any bailiff or sheriff's officer shall hereafter offend, or do contrariwise, he shall be severely punished for so doing: And it is further ordered. That no attorney shall from henceforth acknowledge, or enter, or cause to be acknowledged or entered, any judgment by color of any warrant gotten from any defendant being under arrest, otherwise than as is aforesaid. *E. 15 Car. 2.*

Care must be taken that such warrant of attorney be executed in the presence of an attorney for the defendant, and expressly named by him, who is to inform him of the nature of such warrant, and the attorney is to subscribe his name as a witness to the due execution thereof; such attorney, whether of the one court or the other, is sufficient. *Str. 530. Bland v. Packenham.*

This rule does not extend to cases where the defendant is in custody upon an execution, but only where he is in custody upon *mesne process*. The reason of this distinction is, that where a man is arrested upon *mesne process*, the debt is not liquidated, and therefore under duress, he may be prevailed upon to confess more than is really due; but upon an execution the debt is liquidated, and therefore the only purpose of defendant's giving a warrant of attorney in such case is, to procure his liberty.

If indeed it could be shewn that a party even in execution had been prevailed upon to acknowledge a judgment for more money than was really due, the court would give relief under the circumstances. Because cases of fraud and imposition are exceptions to all rules. *Fell v. Riley, Crop. Rep. 281.*

Prisoner in execution paid part of the debt and executed a new warrant of attorney, without an attorney being present, the court held it was well given;

ledge a judgment but in presence of an attorney for the defendant.

An attorney must be present;

Construction of Rule E. 15 C. 2.

If confessed for more than due.

New warrant executed.

given; for the defendant had a benefit by it in gaining time. *Watkins v. Hanbury.* 2 Str. 1245.

When no necessity for an attorney to be present.

It was declared that the general rule of *E. 15 Car. 2.* about the necessity of an attorney for the defendant being present whenever a person in custody gives a warrant of attorney to confess judgment, is confined to judgment in the *particular cause* whereupon he is in custody, and does not extend to warrants of attorney given to confess judgment in other actions; for, in the first case, the attorney being present, is to avoid all practices on the part of the plaintiff, and to see it is done without duress of imprisonment; in the other, the plaintiff has no power over the defendant. 3 Burr. 1793. *Holcombe v. Wade.* 2 Ld. Raym. 797.

When judgment is to be entered up without motion.

If the judgment is *not* entered up within a year and a day after the warrant of attorney given, it cannot be done without motion in term time, which must be upon an affidavit of the debt being due, or part thereof unsatisfied, the due execution of the warrant, and the defendant's being alive. It may be done on the same affidavit before a judge in vacation, who will make an order to be entered up.

If 30 years old, motion must be made.

If the warrant of attorney be above ten years old, the motion must be made in court, on the like affidavit.

How to enter it up if given to a *feme sole*, who afterwards marries.

If it is given to a *feme sole*, and she marries before judgment is entered up, application must be made to the court, for leave to enter it up by the husband and wife, founded upon an affidavit proving their marriage. 3 Burr. 1469. *Marder et Ux. v. Lee.*

If to two, and one dies.

If a warrant of attorney be given to two, and one dies before judgment entered, leave will be given to the survivor to enter it up. 1 Wils. 312. *Todd v. Dodd.*

If obtained by fraud.

The court will order a warrant of attorney to confess judgment, to be delivered up, if obtained by fraud, before any use has been made of it; *Buller J.* observing, that the court had the same jurisdiction as if the judgment had actually been entered up. If it were otherwise, he said, the consequences would be extremely

extremely inconvenient; for the judgment might be entered up in the vacation, and defendant taken in execution before any application could be made to the court. *Deug. Rep.* 196. *Duncan v. Thomas.*

The court will not set a warrant of attorney aside on account of its being given by a defendant in custody, without an attorney present on his part, if executed by the defendant *purposely with a view to cheat the plaintiff.* *Gillman v. Hill, Cowp. Rep.* 141.

Will not set it aside, if given with a view to cheat.

When to enter it up if defendant dies.

Woodward gave a warrant of attorney to confess a judgment, and died within a year after in time of vacation, before the *essoign-day* of the subsequent term, which was *Easter* term: the attorney, after his death, entered up the judgment as of the preceding term, but brought not the roll in before the *essoign-day* of *Easter* term; and it was moved to have the judgment set aside, the warrant of attorney being revoked by the death of the party. *Holt, C. J.* If the party dies in the vacation, the attorney may enter up judgment that vacation, as of the preceding term, and it is a judgment at the common law, as of the preceding term, though it be not so upon the statute of frauds in respect to purchasers, but from the signing; so this judgment is good. 1 *Salk.* 87. 2 *Ld. Ray.* 766. 2 *Str.* 882. 1081. *Chancey v. Needham.*

A judgment entered up by an attorney's clerk, who used the name of a regular attorney, but without his knowledge or consent, was set aside. 5 *Burr.* 2660. *Hopwood v. Adams.*

Judgment entered by an attorney's clerk, who used the name of a regular attorney, set aside. Will not set it aside if signed, though defendant died the day it was signed, at seven in the morning.

Court would not set aside a judgment upon an old warrant of attorney signed, though the defendant died the day the motion was made for leave to enter it up, viz. at seven in the morning. *Str.* 1081. *Chancey v. Needham.*

The court will not give leave to enter up judgment of 20 years standing *nunc pro tunc.* *Str.* 639.

A warrant to confess judgment given by a prisoner in Ireland, is subject to the rule requiring an attorney's presence. *Ibid.* 1247. *Fitzgerald v. Plunkett.*

The

Judgment on Warrant of Attorney.

The warrant given by one executor, will not justify the entering a judgment against all. *Ibid.* 20. *Elwel v. Quash et al.*

It cannot be entered after plaintiff's death. *Ibid.* 718. *Wild v. Sands.*

A warrant of attorney and release of errors is good in one instrument. *Ibid.* 1215. *Landon v. Pickering.*

Cannot enter judgment on warrant of attorney after

plaintiff's death, unless the words executors, &c.

Leave will be given to enter up a judgment on an old warrant of attorney at the suit of an executor, if the words are at the suit of the plaintiff, his executors, &c. after the death of the plaintiff, but not otherwise. *Barnes* 44.

How to apply in Vacation.

How to apply in vacation.

If judgment is to be signed in the vacation, take the affidavit to a judge's chambers, who will give you an order to enter up same; pay 4s.; no counsel's hand is requisite.

In term.

If it is signed in term, you get counsel to move for leave to enter up judgment; pay 10s. 6d. draw up rule at the clerk of the rules; pay 5s. if a country affidavit, 2s. filing; then sign your judgment on a double half crown, as hereafter.

In the King's Bench.

A. B. plaintiff,
and

C. D. defendant.

Affidavit.

A. B. of, &c. the above-named plaintiff, and E. F. of, &c. gentleman, severally make oath, and say, and first this deponent A. B. for himself saith, That the above-named defendant C. D. being justly indebted unto this deponent in the sum of 20*l.* for money paid for the said defendant, did, in order to secure unto him the same, execute unto this deponent a warrant of attorney, bearing date the 10th day of January 1781, thereby authorising certain attornies therein named, or any other attorney of this court, to appear for him the said C. D. as of the then last Michaelmas term, or any other subsequent term, and then and there to receive a declaration for him in an action of debt, for 40*l.* for money borrowed,

borrowed, at the suit of this deponent, and to confess the same action, or else to suffer a judgment by *nil dicit* or otherwise, to pass against him in the same action, and to be thereupon forthwith entered up against him of record of this court. And this deponent further saith, That there is justly due and owing to him, this deponent, for principal money and interest thereon, the sum of 22*l.* 11*s.* (or the sum of 10*l.* the defendant having paid the sum of 12*l.* 11*s.* part thereof, as the case is); and that he verily believes the said defendant is living, he this deponent having seen and conversed with him about ten days since. And this deponent *E. F.* for himself saith, That he was present, and did see the said warrant of attorney executed by the said defendant, and that the name *C. D.* set and subscribed at the foot thereof, is of the proper hand writing of the said *C. D.* and that he did sign, seal, and, as his act and deed, deliver the same in the presence of this deponent; and that the name of *E. F.* set and subscribed as the witness thereto, is the proper handwriting of this deponent.

The judgment is signed upon a double half-crown stamp, and common bail must be filed, *R. H. 1 W.* judgment. *How to sign*
& M. and a memorandum or minute must be filed on a 2*s.* 6*d.* stamp with the clerk of the bails, as directed by the *stat. 25 Geo. 3. c. 80.*; first enter the warrants of attorney on the roll, then the memorandum of the term you sign the judgment. *See the whole entry, title Judgment.*

In the King's Bench.

A. B. is retained to enter up judgment on a *The memorandum or minute.*
corroboravit (or warrant of attorney to acknowledge judgment, as the case may require). Dated on the

day of at the suit of *C. D.* against *E. F.*

Entered or filed of } *A. B.* attorney, (if by an
 record, this } agent add) by *G. H.* his
 day of } agent.

31 *Geo. 3.*

The

If a bankrupt to gain his liberty execute a new warrant of attorney and bond for same debt, it is an extinguishment of the old debt, and he shall not be discharged although he has his certificate.

The defendant was in execution in September 1785, a commission issued, and he was declared bankrupt. Soon after, and to obtain his liberty, he gave plaintiff a bond and warrant of attorney to confess judgment for the old demand. That being put in force, motion, why he should not be discharged out of custody, he having obtained his certificate. The ground was, that no attorney was present at the execution of the warrant of attorney; or supposing it to be good, yet the debt might have been proved under the commission. *Per cur.* This is certainly to be considered in the light of a new debt, arising upon a new consideration, because the bond and warrant were given, in order to procure defendant's liberty. The old debt was thereby extinguished. *Rule disch. Birch v. Sharland. 1 Term Rep. 715. vide Vigers v. Aldrich. 4 Burr. 2482. S. P. 1 Term Rep. 559. Jacques v. Withy.*

When will direct an issue.

The court will, if a warrant of attorney is given for a *usurious debt*, direct an issue to try the same. *Cox v. Jones. Cowp. Rep. 727.* As there can be no plea to a *scire facias* of this sort.

Judgments.

ENTRY on the roll, of an interlocutory judgment, award of inquiry, and final judgment thereon, where declaration is of a former term.

As yet of the term of the Holy Trinity, in the 31st year of the reign of king George the third. Witness Lloyd lord Kenyon.

Warrant of attorney for plaintiff.

London, (ss.) John Denn (the plaintiff) puts in his place, J. J. his attorney, against Richard Fenn (the defendant), in a plea of trespass on the case.

For defendant.

London, (ss.) the said Richard Fenn, in his own person, at the suit of the said John Denn, in the plea aforesaid.

Memorandum.

London, (ss.) Be it remembered, That in Easter term last past, before our lord the king at Westminster,

minster, came *John Denn*, by *J. J.* his attorney, and brought into the court of our said lord the king, before the king himself, then there, his certain bill against *Richard Fenn*, being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself, of a plea of trespass on the case; and there are pledges for the prosecution, to wit, *John Doe* and *Richard Roe*; which said bill follows in these words, to wit, *London, (ss.) John Denn* complains of *Richard Fenn*, (here insert the whole declaration exactly to the word *suit*, &c.) then in a new line add the judgment as follows:

And now at this day, (that is to say,) on *Friday* next *Impar lance*, after the morrow of the *Holy Trinity*, in this same term, until which day the said *Richard* had leave to imparle to the said bill, and then to answer the same, &c. at which day before our said lord the king at *Westminster*, came as well the said *John*, by his said attorney, as the said *Richard*, in his own person, and the said *Richard* defends the wrong and injury when, &c. and says nothing in bar or preclusion of the said action of the said *John*, by which the said *John* remains therein undefended against the said *Richard*, for which the said *John* ought to recover against the said *Richard* his damages by occasion of the premises: But because it is unknown to the court of our lord the king now here, what damages the said *John* hath sustained, by reason of the premises aforesaid; it is therefore commanded to the *sheriffs*, that by the oath of twelve good and law-
If in Middlesex,
say, sheriff.
 ful men of their bailiwick, they diligently inquire what damages the said *John* hath sustained, as well by the means aforesaid, as for his costs and charges by him about his suit in this behalf expended; and that they send the inquisition which they shall thereupon take to our lord the king at *Westminster*, on *Monday* next after the morrow of *All Souls*, under their seal, and the seals of those by whose oath they shall take the said inquisition, together with the writ of our said lord the king, to them thereupon directed; the same day is given to the said *John*, at the same place.

Sheriffs inquisition, state it exact.

place. At which day before our said lord the king at *Westminster*, came the said *John*, by his said attorney, and the sheriffs, to wit, Esq; and

Esq; sheriffs of the said city, returned, a certain inquisition indented, taken before at No. 10, *Grocers-hall Court*, *London*, in the parish of *St. Olave-Jewry*, in the ward of *Cheap*, in the same city, on the day of in the 31st year of the reign of our sovereign lord the now king, by the oath of twelve honest and lawful men of their bailiwick; by which it was found that the said *John Denn* hath sustained damages, by occasion of the premises, over and above his costs and charges, to 20*l.* and for those costs and charges to

Judgment signed
day of Nov.
1791.

twenty-nine shillings and four pence. Therefore it is considered that the said *John* recover against the said *Richard*, his damages aforesaid, by the said inquisition above found; and also 9*l.* 10*s.* 8*d.* for his said costs and charges by the court of our said lord the king now here, adjudged of increase, to the said *John*, by his assent; which damages in the whole amount to 31*l.* and the said *Richard* in mercy, &c.

Mercy.

If your declaration be of *one term*, and the interlocutory judgment of *another*, there must be an imparlance entered, so as to continue the pleadings over from the delivery of the declaration, to the signing of the judgment; but if *declaration* and the *judgment* be of *one term*, then an *imparlance* is not necessary, and the entry will be thus:

As yet of the term of the *Holy Trinity* 31 *Geo.* 3.
Witness *Lloyd* lord *Kenyon*.

The like where
declaration is of
the same term.

Middlesex, } *John Denn* puts in his place *J. K.*
to wit. } his attorney, against *Richard Fenn*,
in a plea of trespass and assault.

Middlesex, (*ss.*) The said *Richard Fenn* puts in his place *J. B.* his attorney, at the suit of the said *John Denn*, in the plea aforesaid.

* The first day
of term.

Middlesex, } Be it remembered, That on * *Friday*
to wit. } next after the morrow of the *Holy Trinity*, in this same term, before our lord the king, at *Westminster*, comes *John Denn*, by *J. K.* his attorney,

attorney, and brings into the court of our said lord the king, before the king himself now here, his certain bill against *Richard Fenn*, being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself, of a plea of trespass and assault^b, and there are pledges for the prosecution, to wit, *John Doe* and *Richard Roe*; which said bill follows in these words, to wit, *Middlesex*, to wit, (here enter the declaration *verbatim*, to suit, &c.) then on a new line add the judgment, thus,

And the said *Richard*, by *J. B.* his attorney, comes and defends the force and injury, when, &c. and says nothing in bar or preclusion of the said action of the said *John*, whereby the said *John* remains therein undefended against the said *Richard*, for which the said *John* ought to recover against the said *Richard*, his damages by occasion of the premises; but because it is unknown to the court of our lord the king now here, what damages the said *John* hath sustained by reason of the premises aforesaid; it is therefore commanded to the sheriff, that by the oath of 12 good and lawful men of his bailiwick he diligently inquire, &c. (as in the former one).

London, (ss.) *A. B.* puts in his place *I. I.* his attorney against *C. D.* in a plea of debt.

London, (ss.) The said *C. D.* puts in his place *T. G.* his attorney, at the suit of the said *A. B.* in the plea aforesaid.

London, (ss.) Be it remembered, that on *Friday* next after the morrow of the *Holy Trinity* in this same term, before our lord the king at *Westminster*, comes *A. B.* by *I. K.* his attorney, and brings into the said court of our said lord the king, before the king himself, now here, his certain bill against *C. D.* being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself, of a plea of debt; and there are pledges for the prosecution, to wit, *John Doe* and *Richard Roe*; which said bill follows in these words, to wit, London, to wit, *A. B.* complains of *C. D.* being in the custody of the Marshal of the *Marshalsea* of our

E e

lord

Entry of a judgment on a warrant of attorney.

Put the term at the top.

The date of
warrant of at-
torney.

lord the now king, before the king himself, of a plea, that he render to the said *A. B.* 40*l.* of lawful money of *Great Britain*, which he owes to, and unjustly detains from him. For that whereas the said *C.* on the day of in the year of our Lord 1791, at *London* aforesaid, to wit, in the parish of *St. Mary le Bow*, in the ward of *Cheap*, borrowed of the said *A. B.* the said 40*l.* to be paid to the said *A.* when he the said *C.* should be thereto afterwards requested; yet the said *C.* (although often requested, &c.) hath not yet paid the said 40*l.* above demanded, or any part thereof, to the said *A.* but he to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses, to the said *A.* his damage of 10*l.* and therefore he brings his suit, &c.

Judgment by
nil dicit.

Judgment signed
day of
1791.

And the said *C.* by *T. G.* his attorney, comes and defends the wrong and injury, when, &c. and says nothing in bar or preclusion of the said action of the said *A.* by which the said *A.* remains therein undefended against the said *C.* Therefore it is considered, that the said *A.* recover against the said *C.* his said debt, and also 63*s.* for his damages, which he hath sustained, as well by occasion of the detaining the said debt, as for his costs and charges, by him about his suit in this behalf expended, by the court of our lord the king, now here, adjudged to the said *A.* by his assent, and the said *C.* in mercy, &c.

Mercy.

If it is upon an old warrant of attorney, the master allows 83*s.* for costs.

Judgment by *non
sum informatus.*

And the said *C.* by *I. K.* his attorney, comes and defends the wrong and injury, when, &c. and the said *A.* prays that the said *C.* may answer to his said declaration: whereupon the said attorney of the said *C.* says, that he is not informed by the said *C.* of any answer to be given for the said *C.* in the premises, nor doth he say any thing in bar or preclusion of the said action of the said *A.* by which the said *A.* remains therein undefended against the said *C.* Therefore it is considered that the said *A.* recover

recover against the said C. his said debt, and also (as in the other).

And the said *Richard*, by *J. T.* his attorney, comes and defends the wrong and injury, when, &c. and says, That he cannot deny the said action of the said *John*, nor but that he did undertake and promise, in manner and form as the said *John* hath above thereof complained against him; nor but that the said *John* hath sustained damages, by occasion of the non-performance of the said several promises and undertakings, to 20*l.* as he the said *John* hath above in his said declaration supposed; and hereupon the said *John* prays that the said damages so acknowledged, together with his expences and costs, laid out by him about his suit in this behalf, may be adjudged to him, &c. *Therefore* it is considered, That the said *John* recover against the said *Richard* his damages aforesaid, so by him in form aforesaid acknowledged, and also 10*l.* for his costs and charges by the court here adjudged to the said *John*, by his assent, which said damages, in the whole, amount to 30*l.* and the said *Richard* in mercy, &c.

Judgment by
cognovit actionem
in case, where
the defendant
acknowledges
damages to 20*l.*

Judgment signed
12th Nov. 1791.

Mercy.

To the end of the demurrer book. At which day, before our lord the king, at *Westminster*, came the parties aforesaid, by their attornies aforesaid, and hereupon the premises being seen by the said court here, and fully understood, it appears to the said court here, that the said plea of the said *A.* by way of reply to the said plea of the said *C.* and the matters therein contained, are sufficient in law for the said *A.* to have and maintain his said action thereof against the said *C.* as the said *A.* hath above alleged, for which the said *A.* ought to recover his damages by occasion of the premises; but because it is unknown to the court of our lord the king, now here, what damages the said *A.* hath sustained by the means aforesaid, the sheriffs are commanded (as in the judgment by default).

Judgment on
demurrer to the
replication.

Enter all the proceedings to the end of the issue, Judgment as in the case of a nonsuit.
then go on thus: At which day, before our said lord

E c a

lord the king at *Westminster*, came the parties
aforesaid, by their attornies aforesaid, and the
sheriff did not send the said writ, nor did he do any
thing thereon: Therefore let a jury thereupon come
before our said lord the king, at *Westminster*, on
next, after who neither, &c. the same day
is given to the said *A.* there, &c. At which day, be-
fore our said lord the king, at *Westminster*, came
the said *C.* by his said attorney; and the said *A.*
(although solemnly called) came not; and it ap-
pearing to the court here, that the said *A.* hath ne-
glected to bring the issue above joined on to be
tried, according to the course and practice of the
said court; therefore, according to the form of the
statute in such case made and provided, *It is con-*
sidered, by the said court here, that the said *A.*
take nothing by his said writ, but that he and his
pledges to prosecute, to wit, *John Doe* and *Richard*
Roe, be in mercy, &c.; and that the said *A.* go
thereof without day. *And it is further considered* by
the said court here, that the said *C.* recover against
the said *A.* 14l. 10s. for his costs and charges, by him
about his defence in this behalf sustained, adjudged
by the court here to the said *C.* at his request, ac-
cording to the form of the statute in that case made
and provided; and that the said *C.* have his execu-
tion thereof, &c.

Judgment on a
replication of
mul. tiel record on
a rule to pro-
duce, in case.

To the end of the issue. At which day before our
said lord the king, at *Westminster*, came the parties
aforesaid, by their attornies aforesaid; and the said
C. D. hath not here in court the record of the said
judgment by him above in his plea aforesaid alledged,
but made default of producing the said record.
Therefore it is considered, that the said *A.* ought to
recover his damages by reason of the premises; but
because it is unknown to the court here what damages
the said *A.* hath sustained by the means aforesaid,
the sheriff is commanded, that by the oath of twelve
good and lawful men of his bailiwick, he diligently
inquire what damages, &c. (as in a judgment by de-
fault.)

Entry

Entry of a *retraxit* after plea pleaded, and a confession given, or *relicta verificatione*.—At which day before our said lord the king, at *Westminster* came the parties aforesaid, by their attornies aforesaid; and hereupon the said *C.* by his said attorney, relinquishes his said plea by him above pleaded, and saith, that he cannot deny the said action of the said *A.* nor but that he did undertake and promise, in manner and form as the said *A.* hath above complained against him; nor but that the said *A.* hath sustained damages, by occasion of the non-performance of the said several promises and undertakings, in the said declaration mentioned, to 20*l.* as he hath therein supposed: and hereupon the said *A.* prays that the said damages so acknowledged, together with his costs and charges laid out by him about his suit in this behalf, may be adjudged to him. Therefore it is considered that the said *A.* recover against the said *C.* his said damages, above acknowledged to 20*l.* and also to 5*l.* for his expences and costs by the court of our lord the king, now here, adjudged to the said *A.* and by his assent, which said damages in the whole amount to 25*l.* and the said *C.* in mercy, &c.

And the said *D.* prays a day to rejoin to the said replication, and it is granted to him. &c. And hereupon a day is given to the said *D.* before our lord the king, at *Westminster*, until *Tuesday* next after, &c. for him the said *D.* to rejoin, &c. the same day is given to the said *A.* &c. at which day before our said lord the king, at *Westminster*, comes the said *A.* by his said attorney; and the said *D.* although solemnly demanded, comes not, but makes default, whereby the said *A.* remains therein undefeated against the said *D.* Therefore it is considered that the said *A.* recover against the said *D.* his said debt, and also 5*l.* for his damages which he hath sustained, as well by occasion of the defaulting the said debt, as for his costs and charges about his suit in this behalf laid out, adjudged to the said *A.* by the court of our said lord

Retraxit in case, and confession.

Judgment for want of a rejoinder in debt.

Enter all the pleadings on the roll to the end of the replication.

Mercy.

Non pres for not
entering the
issue,

the king now here, by his assent. And the said D. in mercy, &c.

Enter the warrants of attorney on the roll, then copy the issue delivered, and go on thus: At which day, before our lord the king at *Westminster*, came the parties aforesaid, by their attornies aforesaid, and the sheriff did not return the said writ, nor did he do any thing thereon; therefore, as before, let a jury thereupon come before our lord the king at *Westminster*, on *Thursday* next after the morrow of *All Souls*, by whom, &c. and who neither, &c. because as well, &c. The same day is given to the parties aforesaid, at the same place. At which day, before our lord the king at *Westminster*, came the parties aforesaid, by their attornies aforesaid, and the sheriff did not return the said writ, nor did he do any thing thereon; whereupon the said B. prays the court of our said lord the king here, that the said A. may enter the issue joined between the said parties, whereupon the said A. is ordered by the court of our said lord the king here, that he enter the said issue joined on next, after (the day of the rule) in this same term, on the peril attending the neglect thereof. The same day is given to the said B. there, &c. At which day, before our said lord the king at *Westminster*, came the said B. by his said attorney, and the said A. although solemnly called, came not, but makes default, nor hath he entered the issue joined in the plea aforesaid. Therefore it is considered by the court here, that the said A. take nothing by his aforesaid bill, but that he and his pledges to prosecute be amerced, and that the said B. may depart the court here without day, for ever dismissed therefrom. It is also considered by his majesty's said court here, that the said B. recover against the said A. 8l. for his costs and charges by him about his defence in this behalf expended, adjudged by the said court of our said lord the king now here to the said B. by his assent, according to the form

of the statute in such case made and provided, and that the said *B.* have his execution thereof, &c.

Enter the issue on the roll to the end of the last issue joined, then say; And as well to try the said issues above joined between the parties, as to inquire in case a verdict be thereupon given for the said *A.* against the said *W.* what damages the said *A.* hath sustained by reason of the detention of the said debt, as for his costs and charges by him laid out about his suit in this behalf, by occasion of the premises; whereof the parties have put themselves upon the judgment of the court, in case judgment shall be thereupon given for the said *A.* against the said *W.* Let a jury thereupon come before our lord the king at *Westminster*, on

Judgment against the defendant upon five issues in debt, and on demurrer to the replication to the sixth plea;

next after by whom, &c. and who neither, &c. The same day is given to the said parties there, &c. At which day before our said lord the king at *Westminster*, come the parties aforesaid, by their attornies aforesaid, and hereupon all and singular the premises whereof the parties have put themselves on the judgment of the court, being seen by the court here, and fully understood, and mature deliberation being thereupon had, it appears to the court here, that the plea of the said *A.* by him above pleaded by way of reply to the said plea of the said *W.* by him lastly above pleaded in bar, and the matters therein contained, are sufficient in law for him the said *A.* to have and maintain his said action thereof against the said *W.* Therefore the said *A.* as to that plea, ought to recover his said debt, and his damages by him sustained as aforesaid, against the said *W.* &c. in case a verdict be given upon the said issues for the said *A.* against the said *W.* And as to the trial of those said several issues above joined, between the parties to be tried by the country, and also the inquiry of what damages the said *A.* hath sustained by reason of the detention of the said debt, as for his costs and charges by him laid out about his suit in this behalf, by occasion of the premises whereof the parties have put

themselves upon the judgment of the court, in case a verdict upon the said issues be given for the said *A.* against the said *W.* the process thereof is continued between the parties aforesaid, by the jury aforesaid, being respited between them, before our said lord the king at *Westminster*, until *Monday* next after fifteen days of *Saint Martin*, unless *Sir Francis Buller*, Baronet, one of his majesty's justices assigned to hold pleas in the said court of our said lord the king here before the king himself, should first come on *Saturday* the 26th day of *November*, at the *Guildhall* of the said city, according to the form of the statute in such case made and provided for default of the said jurors, because none of them did appear; at which day before our said lord the king at *Westminster*, comes the said *A.* by his said attorney, and the said *Sir Francis Buller*, the justice aforesaid, before whom, &c. sent here his record had in these words, to wit: Afterwards, that is to say, on the day and at the place within mentioned before *Sir Francis Buller*, Baronet, one of the justices of our said lord the king, assigned to hold pleas in the said court of our said lord the king before the king himself, *Roger Kenyon*, Esq; &c. (to the end of the postea on the fifth issue with the assessment of damages.) It is therefore considered that the said *A.* recover against the said *W.* his said debt, together with his damages, costs, and charges, by the said jury in form aforesaid assessed: and also 34*l.* 19*s.* for his costs and charges by the court of our lord the king now here adjudged to the said *A.* of increase, by his assent, which damages in the whole amount to 37*l.* and the said *W.* in mercy, &c.

See the postea
in that title.
Judgment signed
the day of
1791.

Mercy,

Judgment for the
defendant on a
demurrer to a
plea.

To the end of the demurrer book. At which day, before our said lord the king at *Westminster*, came the parties aforesaid, by their attorneys aforesaid; whereupon the court of our said lord the king now here, having seen and fully understood all and singular the premises aforesaid, and having maturely deliberated thereupon, it appeared to the court of our said lord the

the king now here, that the said plea above pleaded by the said *E.* in manner and form aforesaid, and the matter therein contained, are good and sufficient in law to bar the said *H.* from having his said action against the said *E.* Therefore it is considered that the said *H.* take nothing by his said bill, but that he be in mercy of the court for his false claim, &c.; and that the said *E.* go thereof without day, &c. And it is further considered, that the said *E.* recover against the said *H.* 14*l.* 10*s.* for her costs and charges, laid out by her about her defence in this behalf adjudged to the said *E.* by the court of our said lord the king now here, by her assent, according to the form of the statute in such case made and provided; and that the said *E.* have execution thereof, &c.

To the end of the issue. At which day the jury The like on
between the parties aforesaid, in the plea aforesaid, *non assumpsit*
was respited between them, before our said lord the for the de-
king at *Westminster*, until next after fendant.
unless the justices of our said lord the king, assigned to take the assizes in and for the county aforesaid, by form of the statute, &c. should first come on the day of at *H.* in the county aforesaid. And now here, at this day, the said *I. S.* comes by his attorney aforesaid, and the said justices of assize, before whom, &c. sent here their record in these words, (afterwards, to wit) to the end of the *posse*. Therefore it is considered, that the said *I. M.* take nothing by his said writ, but be in mercy for his false clamor, &c. and that the said *I. S.* go thereof without day, &c. *It is also considered*, that the said *I. S.* recover against the said *I. M.* 17*l.* for his costs and charges, laid out by him in and about his defence, in this behalf adjudged by the court of our said lord the king now here, by his assent, according to the form of the statute in such case made and provided; and that the said *I. S.* have execution thereof, &c.

And the said *F.* by *J. K.* her attorney, comes Against an ad-
and defends the wrong and injury, when, &c. and ministrator in
says, debt.

says, that she cannot deny the said action of the said *A.* nor but the said bond is the deed of the said *F.* nor but that she the said *C.* administratrix as aforesaid, detains from the said *A.* the said 100*l.* in manner and form as the said *A.* hath above complained against her. Therefore it is considered, that the said *A.* recover against the said *F.* administratrix as aforesaid, his said debt, and also 6*l.* 10*s.* for his damages, which he hath sustained, as well by occasion of the detaining thereof, as for his costs and charges by him about his suit in this behalf expended, adjudged to the said *A.* by his assent, to be levied of the goods and chattels which were of the said *F.* at the time of his death in her hands to be administered, if she hath so much thereof in her hands to be administered, and if she hath not so much thereof in her hands to be administered, then the said 6*l.* 10*s.* being the damages aforesaid, to be levied of the proper goods and chattels of the said *C.* and the said *C.* in mercy, &c.

The like by confession in case.

And the said *F.* by *J. K.* her attorney, comes and defends the wrong and injury when, &c. and says, that she cannot deny the said action of the said *A.* nor but that the said *F.* in his life-time did undertake and promise, in manner and form as the said *A.* hath above thereof complained against him, nor but that the said *A.* hath sustained damages by reason of the not performing the said promises and undertakings in the said declaration mentioned, to 25*l.* as the said *A.* hath above supposed: And upon this the said *A.* prays judgment, and his damages so acknowledged, together with his costs and charges by him about his suit in this behalf expended, to be adjudged to him, &c. Therefore it is considered that the said *A.* recover against the said *F.* administratrix as aforesaid, his said damages so above acknowledged, to be levied of the goods and chattels which were of the said *F.* at the time of his death, in her hands to be administered; and if she has not so much in her hands to be administered, then 6*l.* being for the costs and charges laid out by him

him about his suit, by the court of our lord the king now here adjudged, to the said *A.* with his assent, to be levied of the proper goods and chattels of the said *F.* and the said *F.* in mercy, &c.

Enter the declaration and plea of *plene administravit*; and hereupon the said *A.* inasmuch as the said *D.* does not deny the action of the said *A.* but admits the same to be true; and inasmuch as the said *A.* cannot deny, but that she the said *D.* hath not any goods or chattels which were of the said *F.* at the time of his death in her hands to be administered, in manner and form as the said *D.* hath above in her said plea in that behalf alledged, prays judgment, and his damages, on occasion of the non-performance of the said several promises and undertakings in the said declaration mentioned, to be levied of the goods and chattels which were of the said *F.* at the time of his death, when, after final judgment in this respect, they shall come to the hands of the said *D.* to be administered. Therefore it is considered that the said *A.* recover against the said *D.* his damages by him sustained by reason of the premises aforesaid to be so levied; but because it is unknown to the court of our lord the king now here, what damages the said *A.* hath sustained by reason of the premises aforesaid; therefore the sheriff is commanded, that by the oath of twelve honest and lawful men of his bailiwick, he diligently inquire what damages the said *A.* hath sustained by reason of the premises aforesaid; and that he send the inquisition which he shall thereupon take to our lord the king at *Westminster*, on next after . . . under his seal, and the seals of those by whose oath he shall take the said inquisition, together with the writ of our lord the king to him thereupon directed. The same day is given to the parties aforesaid at the same place. At which day, before the lord the king at *Westminster*, came the said *A.* by his said attorney; and the sheriff, to wit, *W. K.* and *L. M.* Esquires, sheriff of the

Judgment of
assets in future
upon a plea of
plene administravit.

There are no costs allowed on a judgment of *assess in futuro*, on a plea of *plene administravit* only. So determined in the C. P.

Judgment of *assess in futuro*, in debt.

the said county, returned a certain inquisition by him taken, &c. on the day of in the 31st year of the reign of our lord the now king, by the oath of twelve good and lawful men of his county, by which it is found, that the said *A.* hath sustained damages by reason of the premises, over and above his costs and charges by him expended, to 50*l.* Therefore it is considered that the said *A.* recover against the said *D.* the said 50*l.* for his damages aforesaid by the inquisition aforesaid above found, to be levied of the goods and chattels which were of the said *J.* at the time of his death, when such goods and chattels shall hereafter come to the hands of the said *D.* to be administered. And the said *D.* in mercy, &c.

This judgment is first signed on a treble penny stamp paper, and notice must be given in the usual way to execute the inquiry, and the plaintiff's debt must be proved before the sheriff; but if the action is in debt, sign it on a double half-crown stamp paper.

And for that the said *Mary* cannot deny but that the said *John* and *Nicholas* have not, nor on the day of exhibiting the bill to the said *Mary*, or at any time afterwards, had any goods or chattels which were of the said *Richard*, at the time of his death, in the hands of the said *John* and *Nicholas*, to be administered, sufficient to satisfy the said *Mary* the said debt; the said *Mary* prays judgment and her said debt to be adjudged to her, to be levied of the goods and chattels which were of the said *Richard*, at the time of his death, and which hereafter shall come to the hands of the said *John* and *Nicholas* to be administered: Therefore it is considered that the said *Mary* recover against the said *John* and *Nicholas* her said debt, to be levied of the goods and chattels which were of the said *Richard* at the time of his death, and which hereafter shall come to the hands of the said *John* and *Nicholas* to be administered; and the said *John* and *Nicholas* in mercy, &c.

Scire

Scire Facias.

Of reviving Judgments by Scire Facias.

After a Year and Day.

ALL writs of execution must be sued out *within* a year and a day after final judgment signed; otherwise the court concludes, *prima facie*, that the judgment is satisfied and extinct: yet however it will grant a *scire facias*, in pursuance of the statute of *Westm.* 13 Ed. 1. c. 45. for the defendant to *shew cause why the judgment should not be revived, and execution had against him*; to which the defendant may plead such matter as he has to alledge, in order to shew why process of execution should not be issued; or the plaintiff may still *bring an action of debt* founded on this dormant judgment, which was the only method of revival allowed by the common law. *Co. Lit.* 290. 2 *Inst.* 469.

A *scire facias* to revive a judgment entered on a bond securing an annuity granted before the 17 *Geo.* 3. c. 26. is an action within that statute; and therefore a memorial of the annuity must be inrolled before brought, and execution on a *sci. fa.* was set aside, the consideration of the memorial not being truly stated. It expressed 1000*l.* money lent; whereas 700*l.* was only lent, and a *respondentia* bond of 27*l.* given, also a deduction of 29*l.* for charges. *Fenner v. Evans*, 2 *Term Rep.* 267.

A *sci. fa.* to revive on a judgment secured to pay an annuity is an action.

A *scire facias* is a judicial, not an original writ, Judicial writ, but is framed out of the record; and it is in the nature of an action, for a release of actions or executions discharges it. *Co. Lit.* 290. b.

It is a *judicial writ* in the nature of an original. In nature of an original, inasmuch as it is founded on a judgment, or other matter of record; and in the nature of an original, since *similar proceedings may be had thereon*

as in common actions: And it hath been held in a variety of cases, that it is an action. *Fenner v. Evans*, 1 Term Rep. 267. 2 Term Rep. 45.

An execution had after a year and day without *sci. fa.* is not void, but voidable. 3 Lev. 140. Salk. 273. pl. 4.

Sci. fa. must be sued out in the county where the original action was.

If there has been *noca. fa.*, *fi. fa.*, *elegit*, or *hab. fac. possessionem* sued out within the year and day, then in order to revive the judgment, and take out execution, you must sue out a *scire facias* into the county where the original action was brought, the court supposing the defendant to reside in the same county. Salk. 258. 600. Comb. 250. N. on R. E. 5 Geo. 2.

No *sci. fa.* necessary, if defendant has made the delay.

This *sci. fa.* was intended to prevent a surprize upon the defendant after the year and day elapsed; but where he effects the delay, by bringing a writ of error, though above a year and day, yet execution may issue without a *sci. fa.* Cro. Jac. 364. So if he be nonsuited, or discontinues in error, though the year was expired before error brought. *Ibid.*

So if there be a *cesset executio* for a year, no *scire facias* is necessary; but if not taken out within a year after the *cesset executio* is determined, a *sci. fa.* must be sued out. *Mod. Caf.* 288.

If an injunction.

An execution was taken out without a *sci. fa.* where the defendant had made delays by bills in chancery for injunctions, and by obtaining time for payment, which the court held regular, and discharged the rule obtained for setting the proceedings aside with costs. 2 Burr. 660. *Mitchell v. Cue.*

Computation of the year.

The year is to be computed from the day of signing judgment, not by the number of terms. *Mod. Caf.* 288.

If execution not returned or not filed, continuances cannot be entered.

If execution is not returned by the sheriff, or not filed, continuances on it cannot be entered on the roll; and if they are, and thereupon a *ca. fa.* is issued after the year, without *sci. fa.* defendant shall be discharged out of custody, and plaintiff pay costs. *Vide 2 Wils.* 82. *Barnes* 213.

If

If Plaintiff or Defendant die after Final Judgment, and before Execution.

It is held that in no case where the parties to the judgment are changed, ought execution to be sued by any other without a *scire facias*; therefore, if the plaintiff dies before execution awarded, the execution cannot be sued out in his name before *sci. fa.* In no case where parties are changed, ought execution to go without a *sci. fa.*
 2 *Ld. Ray.* 768. But if execution is executed before death of plaintiff, it is good, for the plaintiff's death does not alter the execution. Also, upon the death of the defendant, after final judgment recovered [against him, no execution can issue against his executors or administrators, without a *scire facias*, to shew cause why the plaintiff should not have execution against the goods, &c. of their testator. *Lutw.* 1273. To this the executors and administrators may appear and plead such matter as they have to alledge, why execution should not issue: If not, judgment will be signed by default, and execution may issue thereon against the goods, &c. of their testator, in their hands. But I take it, if the defendant die in the vacation, and the judgment is not *above a year and a day past*, the plaintiff may levy on his effects without reviving by *scire facias*. If defendant die after final judgment. 1 *Salk.* 87. 2 *Str.* 1081.

If one recover against a *feme sole*, and she is married within the year and day, a *sci. fa.* must go against the husband. *Wood's Inst.* 670. *Lut.* 1273. If recovery against a *feme sole*.

The husband cannot have execution for the costs on a plea of coverture found for the defendant without a *sci. fa.* it being a maxim, that a person not a party to the record, cannot be benefited or charged with the process without a *sci. fa.* *Dougl.* 637. *Wortley v. Rayner.* The husband cannot have execution on a plea of coverture.

It is necessary in case the plaintiff becomes non-suit. Necessary on a nonsuit.

If an executor or administrator obtains judgment, and dies before execution, an administrator *de bonis non*, &c. shall have a *sci. fa.* upon such judgment. If executor die, adm. de bonis non may have it.
Stat.

Stat. 17 Car. 2. c. 8. Jon. 214. 1 Rol. 890. Cro. Car. 167.

If against two.

If a judgment be against *two*, the *sci. fa.* must be against both. 2 Salk. 298.

If execution once sued out, need not sue out *scire facias*.

If a writ of execution be once *sued out, returned, filed, and entered on the roll*, it may be continued until you sue out and execute a new one, and be as effectual as if new writs were issued out every term. Str. 100. *Aires v. Hardress*.

When may or not be sued without Motion.

May be sued out of course within seven years, but afterwards a motion must be made at side bar.

THE writ of *scire facias* may be sued out of course at any time *within seven years* of the judgment being signed, but *after that*, there must be a motion for leave to sue it out at the side bar, which is done by attending at *Westminster* before the judges go into court. The clerk of the rules draws up the rule in the evening; there is no occasion to serve it on defendant or his attorney. Salk. 598. Comb. 356.

May be sued out if not above 10 years, on motion without affidavit.

It may be had upon motion in court, without an affidavit of the debt or the defendant living, if the judgment be not above ten years old. Counsel's fee is 10s. 6d. it is absolute in the first instance, rule 6s. *Vide Salk. 598.*

If above 10 years.

If it be *above ten years* standing, the plaintiff must move the court on an affidavit *of the debt being due, the judgment unsatisfied, and that the defendant is living.* Clerk's Instr. 159. Style 495.

When new *sci. fa.*

If *after* such motion the judgment is revived, and then the defendant dies *before execution*, the plaintiff must sue out a new *sci. fa.* and may have it without motion; for the judgment was revived before. Salk. 598.

Execution cannot be sued out after judgment revived, if above a year and a day.

Execution cannot be sued out on a judgment revived by *scire facias* after the year and day, and no execution issued, but must be again revived.

When an *alias* requisite.

If upon a *scire facias*, the sheriff returns *scire feci*, and defendant makes default in appearance, there shall be judgment against him. But in all cases when

when the sheriff returns *nihil*, another *scire facias* shall be awarded. 2 *Mod.* 227. 2 *Inst.* 472. And if he does not appear, there shall be judgment against him. *Dy.* 168.

It is ordered, that every writ of *scire facias*, of which notice shall be given to the defendant, shall be delivered to, or left in the office of the sheriff to whom directed, four days before the return of such writ, exclusive of the day, on which such writ is returnable. *Scire facias* to be left four days before return if notice is given.

R. E. 5 *Geo.* 2. And that every first writ of *scire facias*, on which a *nihil* shall be returned, shall be delivered to, or left in the office of the sheriff, some time before the return of such writ: And that every writ of *alias scire facias* shall be delivered to, or left in the office of the sheriff, four days exclusive before the return of such writ; and every sheriff shall write or indorse on such writ, the day of the month in which it the same is delivered to him, or left in his office. *Ibid.* If a *nihil* some time before return. *Alias* four days. Sheriff to indorse it.

It is ordered, that upon issuing any writ of *scire facias*, upon any suit here depending, no writ of *alias scire facias* shall thereupon issue, until the first writ of *scire facias* be returnable: If sued contrary to this rule, such *alias* shall be void. *R. T.* 8 *W.* 3. No *alias* to issue until the first writ be returnable.

Each *sci. fa.* by bill shall have seven days between the *teste* and return. *N. on R. E.* 5 *Geo.* 2. If there be two there must be 15 days between the *teste* of the first and return of the second, without any regard to the number of days between the *teste* and return of each. *Str.* 1139. It cannot be tested on a Sunday. *Dy.* 168. *Mod. Cas. Law and Equity*, 227. 305. *Salk.* 599. And every writ of *alias* shall bear *teste*, the day of the return of the first. *Salk.* 599. 6 *Mod.* 86. Each to have seven days between *teste* and return by bill.

If one *scire facias* only issue and a *scire feci* be returned, the time between the *teste* and return is not settled. *N. on Rule E.* 5 *Geo.* 2. I take it there should be 15 days in this case, which would be equal to two *sci. fa.*'s., returned *nihil*. If one *sci. fa.* only issue and notice.

Every *scire fac.* by original, ought to have fifteen days inclusive between the *teste* and return, unless By original 15 days.

F f

helped

helped by *stat.* 16 *Car.* 1. c. 6. and 13 *Car.* 2. c. 2. *N. on R.* 8 *W.* 3.

First *sci. fa.* left
one day before
return, will do.

The general practice upon two *sci. fa.*'s. is, to leave the first *one day before* the return for a *nihil*, which is thought to be a sufficient time within the rule of *E.* 5 *Geo.* 2.

When may
summon.

Per Cur. If it lay *four days* in the office, that is all which is required; the summons may be made at *any time before the court is up, on the day of the return.* *O'Brien v. Frazier.* 1 *Str.* 644. *Vide* 3 *Burr.* 1360. *Hunt v. Cox.*

To revive a judgment it is seldom that the party is warned by the sheriff; but if he is, the *scire facias* must be left at the sheriff's office, and a summons taken thereon, directed to an officer, pay 2s. 4d. who will serve it.

How to be sued
out.

To be ingrossed on a 2s. 6d. stamp parchment, which take to Messrs. *Provost* and *Webb*, with a *præcipe*, who will sign it, pay 1s. 8d. seal 7d. If left for a return of *nihil*, take it to the sheriff's office, pay 1s. for each defendant; upon the *return day*, sue out an *alias*, sign and seal it as before, and leave it at the sheriff's office.

To be short.

A *sci. fa.* ought to be as short as possible, because it is of the nature of writs to set forth things very briefly; and a writ is therefore called a brief, from the latin word *breve*, which signifies short or compendious. 2 *Lill.* 609.

Præcipe.

Middlesex, sci. fa. to revive for A. B. against C. F. for 1000l. debt, and 63l. damages, returnable on, &c.
J. K. attorney.

Scire facias in
debt.

George the 3d, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, &c. to the sheriff of *Middlesex*, greeting: Whereas *John Denn*, lately in our court before us at *Westminster*, by bill without our writ, and by the judgment of the same court, recovered against *Charles Fenn* 1000l. for a debt, and also 63l. for his damages which he sustained, as well by occasion of the detaining the said debt, as for his costs and

and charges by him about his suit in that behalf expended, whereof the said *Charles* is convicted, as appears to us of record; and now on the behalf of the said *John* we have been informed, that although judgment be thereupon given, yet execution for the said debt and damages, still remains to be made to him; whereupon the said *John* hath humbly besought us to provide him a proper remedy in this behalf; and we being desirous that what is right and just should be done on this occasion, command you^a, that by good and lawful men of your bailiwick, you cause it to be made known to the said *Charles*, that he be before us, at *Westminster*, on *Monday* next after the morrow of *All Souls*, to shew if he has, or knows of any thing to say for himself, why the said *John* ought not to have his execution against him for the debt and damages aforesaid, according to the force, form, and effect of the said recovery, if it shall seem expedient for him so to do: and further to do and receive what our said court before us, shall then and there consider of him in this behalf; and have you there then the names of those by whom you shall so make known to him, and this writ. Witness *Lloyd* lord *Kenyon*, at *Westminster*, the 13th day of *July*, in the 31st year of our reign. *Stermant and Way.*

^a If an *alias*, say, as before we have commanded you.

George the third, &c. To the sheriff of *Kent*, The like in case, greeting: Whereas *John Buttle*, lately in our court before us at *Westminster*, by bill without our writ, and by the judgment of the same court, recovered against *Charles Waters* 50*l.* for his damages, which he had sustained, as well by occasion of the not performing certain promises and undertakings made by the said *Charles* to the said *John*, as for his costs and charges by him about his suit in that behalf expended, whereof the said *Charles* is convicted, as appears to us of record, and now on the behalf of the said *John*, we have been informed, &c. (as in the other precedent, only leave the word "*debt*" out).

For his damages which he had sustained, as well by means of a certain trespass committed by the said *C.* at *B.* in your county, as for his costs, &c. The like in trespass.

The like in trespass and assault.

For his damages which he had sustained, as well by occasion of a certain trespass and assault made by the said *C.* on the said *Y.* at *B.* in your county.

If in covenant.

For his damages which he had sustained, by reason of a certain breach of covenant made by the said *C.* to the said *A.* as for his costs, &c.

Sci. Fa. for and against Executors and Administrators.

Against an administratrix.

George, &c. Whereas *A. B.* lately in our court before us at *Westminster*, by bill without our writ, and by the judgment of the same court, recovered against *C. D.* 40*l.* for his damages, which he had sustained, as well by occasion of the detaining the said debt, as for his costs and charges by him laid out about his suit in that behalf, whereof the said *C.* is convicted, as appears to us of record, and now on the behalf of the said *A.* we have received information in our court before us, that although judgment be thereupon given, yet execution of the said damages, still remains to be made to him; and the said *C. D.* is since dead intestate, and administration of all and singular the goods and chattels, rights and credits, which were of the said *C.* at the time of his death, was committed and granted to *E. F.* the widow and relict of the said *C.* in due form of law, as we have received information from the said *A.* whereupon the said *A.* hath besought us to provide him a proper remedy in this particular, and we being willing, that what is just and right should be done, command you that by honest and lawful men of your bailiwick, you make known to the said *E.* administratrix as aforesaid, that she be before us at *Westminster*, on next after to shew if she has or knows of any thing to say for herself, why the said *A.* ought not to have his execution against her, for the damages aforesaid, to be levied of the goods and chattels which were of the said *C.* at the time of his death, in her hands to be administered, according to the force, form, and effect of the said recovery, if it shall seem expedient for him

him so to do ; and further to do and receive (as in the former one).

George, &c. to the end of the words " yet The like against an executor. execution of the damages still remains to be made to him," then say : And whereas the said C. D. is since dead, having first duly made his last will and testament, and appointed E. F. executor thereof, as we have been informed in our said court before us ; whereupon the said A. hath besought us to provide him a proper remedy, &c. as in the other ; only say *executrix*, instead of *administratrix*.

Three executors, two of whom were infants, he of full age proved, and he alone brings a *sci. fa.* Three executors and two infants. sets forth the truth, and obtains judgment. Error brought and assigned, that all ought to have joined—held no error ; for the others cannot prove the will during their nonage, and the judgment affirmed ; for the execution shall not be delayed till the infants come of full age. *Hatton v. Mascall*, 1 Lev. 181. 2 Saund. 212, 213.

George the third, &c. Whereas A. B. lately in our court before us (as in the first *sci. fa.* to " re- The like for an executor. cord,") yet execution of the said judgment still remains to be made, and the said A. is since dead, as we have received information from C. G. executor of the last will and testament of the said A. and because we are willing (as in the former one) to shew if he hath, or knoweth of any thing to say for himself, why the said C. G. executor, as aforesaid, ought not to have execution against him for the damages aforesaid, according, &c.

And the said A. is since dead, as we have received information from E. administrator of all and singular the goods and chattels, rights and credits of the said C. D. deceased, and because we are willing, &c. The like for an administrator.

How to proceed to Judgment.

When the Sheriff has returned upon the first *sci. fa.* *scire feci*, or a *nihil* upon the first, and also on the How to proceed on sci. feci by bill.

alias; on the return day of the *alias*, or first *sci. fa.* (if only one is sued out, and a *sci. feci* returned on it), give a rule at the clerk of the rules, which is wrote on a plain piece of paper thus, "*A. B. against C. D. rule on sci. fa.*" pay 1s. 10d. which expires four days exclusive of the day it is given; and if the defendant does not appear, execution may be taken out after the entry of the *sci. fa.* with the clerk of the judgments.

How to enter judgment by default.

Get *sci. fa.* from the sheriff's office returned, then enter on a roll as far as the sum recovered, take same to the clerk of the judgments, and he marks the roll and the two *sci. fa.*'s, pay 2s. for the entry, which is as follows:

The entry of two *sci. fa.*'s.

Middlesex, } Our lord the king hath sent to his to wit. } sheriff of *Middlesex*, his writ closed in these words, to wit, *George* the third, (to the end of the first *sci. fa.*) *Stormont* and *Way*. Then on a new line—At which day before our lord the king, at *Westminster*, came the said *A.* in his own proper person, and the sheriff, to wit,

and

esquire, sheriff

of the said county, returned to us, that the said *C.* had not any thing in his bailiwick, where, or by which he could give him notice, as by the said writ he was commanded, or was the said *C.* found in the same; therefore as before it was commanded to the said sheriff, that by honest and lawful men of his bailiwick, he make known to the said *C.* that he before us, at *Westminster*, on^a

^a The return day of the *alias*.

after

to shew in form aforesaid, if, &c.

and further, &c. the same day is given to the said *A.* there, &c. at which day before our said lord the king, at *Westminster*, came the said *A.* in his proper person, and the sheriff as before returned, that the said *C.* had not any thing in his bailiwick, where, or by which he could give him notice, as by the said writ he was commanded, or was the said *C.* found in the same; and the said *C.* although solemnly called, came not, but made default. Therefore it is considered, that the said *A.* have his execution

Judgment by default.

execution against the said C. for the debt and damages aforesaid, according to the force, form, and effect of the said recovery, by the default of the said C. &c.

If there be a *scire facias* of one term, and the second *sci. fa.* returnable the next term; enter the first on the roll, with an award of the second as far as the return day; then docket it, otherwise you will have a *post terminum* to pay.

London, (s.) Our lord the king hath sent to his ^{The entry of one} sheriffs of London his writ, closed in these words, to ^{sci. fa.} wit, George the third, &c. (to the end of the *scire facias*, Stormont and Way); at which day before our lord the king at Westminster, came the said A. in his own proper person, and the sheriffs, to wit, and sheriffs of the said city, returned to us, that they had made known to the said C. that he be before the king on the day and at the place in the said writ mentioned, as by the said writ they were commanded. The same day is given to the said A. there, &c. And the said C. although solemnly called, came not, but made default. There- ^{Judgment.} fore it is considered that the said A. have his execution against the said C. for the debt and damages aforesaid, according to the force, form, and effect of the said recovery, by the default of the said C. &c.

Of the Appearance and Declaration.

If the defendant appears to the *scire facias*, by ^{Appearance:} bill, he does it by a note in writing delivered to the plaintiff's attorney, before the end of the four days, after the rule on the *sci. fa.* is given, thus, "A. B. against C. D. I appear for the defendant upon the writ of *scire facias* issued in this cause.

"Your's, J. K. attorney."

A memorandum on a 2s. 6d. stamp I take to be necessary, and to be filed with Messrs. Provoost and Webb.

If appearance.

If the defendant does appear, then declare against him in this form.

Michaelmas term, 32d George the third.

Declaration on a
scire facias.

Middlesex, (ss.) Our lord the king sent to his sheriff of *Middlesex*, his writ closed in these words, to wit, *George the third*, (to the end of the entry on the roll, as far as the return of the sheriff of the second *sci. fa.* if there are two), then say, *At which day before our said lord the king, at Westminster, came the said C. by J. B. his attorney, and thereupon the said A. prays that execution may be adjudged to him, of the debt and damages aforesaid, according to the force, form, and effect of the said recovery, &c.*

What is a sufficient certainty in a *sci. fa.*

A declaration on a *scire facias* by the assignees of a bankrupt, stating, "that he became a bankrupt within the meaning of the statute, &c. and that his goods and effects were afterwards in due manner assigned to the plaintiffs," is sufficiently certain, without alledging that the party was declared a bankrupt, or that his effects were assigned by deed. *Winter assignees of Beyer v. Kretchman. 2 Term Rep. 45.*

A declaration on a *sci. fa.* returnable the last return, may be entitled of the *same term generally. Vide 3 Wils. 154. Ward v. Gansell.*

Proceedings.

To be engrossed on a treble penny paper, charge 8d. per sheet drawing, and 4d. for the copy, besides stamps, and all the proceedings are to be delivered to the attorney for the plaintiff, by bill as well as original, who makes up the issue or paper book; a rule to plead is to be given, and plea demanded, and all proceedings are the same as in other cases. If there be an issue, you begin with declaration, there being no memorandum in this case.

Sci. fa. cannot be amended.

If the *sci. fa.* is bad, it cannot be amended, but you must move to quash it, which is done by counsel on motion in the first instance, see 10s. 6d. rule 5s. *Str. 401. Hillier v. Frost.*

Where probate ought to be taken after final judgment,

If final judgment be obtained against *B.* by *A.* who afterwards dies, his executor must take probate of his will, so as to recover the money, at *Dockers Commons,*

Commons, for the money is assets at *Westminster*, and the executor cannot maintain the *sci. fa.* without such probate. 6 *Mod.* 134. So if administration is granted. 7 *Mod.* 15. and before re-
vivor.

A *scire facias* to revive a former judgment, is so far a continuation of the same action, that if the plaintiff's testator had agreed not to bring a writ of error, in that former action, such agreement shall bind his executors upon the *scire facias* being brought against them. 1 *Term Rep.* 388. *Wright v. Nutt.* How far it is a continuation of the former action.

Baron and *feme* brought a *sci. fa.* upon a judgment recovered by the *feme dum sola*. After execution awarded, the *feme* dies, it was held, it survived to the husband. 3 *Mod.* 186. *Salk.* 116. *Sci. fa.* by *baron* and *feme* on a judgment recovered by *feme* whilst *sole*, if after execution awarded, she die, it survives to the husband.

Judgment was recovered against a *feme sole*, who after married; a *sci. fa.* was sued out against the husband and wife, and judgment against them; before execution executed, the wife died, and after her death, a new *sci. fa.* was issued against the husband, and he was held chargeable; but he was not liable upon the first judgment. *Salk.* 117. Judgment against a *feme sole*, who after married; before execution, wife died, the husband is chargeable.

Judgment in ejectment, and after a year and a day, there was a *ha. fac. poss.* without bringing a *sci. fa.* and adjudged that it ought to be brought as well against the *tertenants* as against the defendants. *Withers v. Harris.* 3 *Salk.* 319. pl. 1. In ejectment execution cannot be sued out after the year and day without *sci. fa.*

Proceeding by Original.

If the proceedings are by original, the master says, the *scire facias* after judgment is to be made out by the attorney, and signed by Messrs. *Provoost* and *Webb*; pay 1s. 8d. and 7d. seal. If *sci. fa.* be by original.

George the third, &c. to the sheriffs of *London*, greeting: Whereas *A. B.* lately in our court before us at *Westminster*, by our writ, and by the judgment of the same court, recovered, &c. (as in one by bill, to the word behalf), and have there the names of those by whom, &c. Witness, &c. The return must be *Sci. fa.* by original.

be a general one; as, on the morrow of *All Souls*, wheresoever we shall then be in *England*. *Stormont and Way*. And there must be *fifteen* days between the *teste* and *return of each writ*. A rule may be given on the return day of the second, with the clerk of the rules; when expired, sign judgment; but then it must be *four days after the quarto die post of the return of the second sci. fa. if there be two*; if not, *four days after the quarto die post of the first, if returned scire feci*.

As to *teste*
and *return*.

A *scire facias* was tested, making both the *teste* and *return inclusive of the fifteen days*, and held well. *Salk. 599. 2 Jones 228.*

If Plaintiff or Defendant die after Interlocutory, and before Final Judgment, how to proceed.

Proceedings by
an executor or
administrator
after interlocu-
tory judgment.

At common law, the death of either party abated the suit; but now it is otherwise by the statute 8 & 9 *W. 3. c. 10. s. 6.* which enacts, that if any plaintiff die after interlocutory and before final judgment, the action shall not abate, if it might originally be prosecuted by the executors, &c. of such plaintiff; and if the defendant die after interlocutory and before final judgment, the action shall not abate, *if it might originally be prosecuted against the executors, &c. of such defendant*; and the plaintiff, or, if he be dead after such interlocutory judgment, his executors, &c. may have a *scire facias* against the defendant, if living, after such judgment; or if he died after, then against his executors, &c. to shew cause why damages in such action should not be assessed and recovered.

How to proceed
if plaintiff dies.

If the plaintiff dies after interlocutory judgment signed, and before inquiry, make out the following *sci. fa.* and if not returned *scire feci*, make out an *alias*, and proceed to judgment in the same manner as before stated.

Sci. fa. by an
executor after
an interlocutory
judgment, and
before inquiry
executed.

George, the third, &c. To the sheriffs of *London*, greeting: Whereas *S. J.* lately in our court before us, at *Westminster*, by bill without our writ, im-
pleaded

pleaded *J. H.* being in the custody of the marshal of our *Marshalsea* before us; For that whereas, (here recite the whole declaration) to the said *S. J.* his damage of 50*l.* as he said, and thereupon he brought suit, &c. and such were the proceedings in our said court before us at *Westminster*, that afterwards, to wit, in *Hilary* term last past, it was considered by our said court before us, that the said *S.* ought to recover his damages by occasion of the premises; but because it was unknown to our said court before us, what damages the said *S.* had sustained by means of the premises aforesaid, we commanded you, that by the oaths of twelve good and lawful men of your bailiwick, you should diligently inquire what damages the said *S.* had sustained, as well by occasion of the premises, as for the costs and charges by him laid out about his suit in that behalf; and that you should send the inquisition, which you should thereupon take, to us at *Westminster*, at a certain day now past, under your seal, and the seals of those, by whose oath you should take that inquisition, together with our writ to you for that purpose directed, as by the record and proceedings thereof, remaining in our said court before us, at *Westminster* aforesaid, more fully and at large appears; yet inquisition of the said damages still remains to be made; and the said *S.* after interlocutory judgment had been given in form aforesaid, and before the return of our said writ of inquiry by us to you sent as aforesaid, for the purpose aforesaid, died ^b, having first duly made his last will and testament in writing, and appointed *J. B.* sole executor thereof, upon whose death the said *J. B.* duly proved the said will, in the prerogative court of the Archbishop of *Canterbury*, in due form of law, and took upon himself the burthen of the execution thereof, as by the said *J. B.* we are given to understand, and be informed, wherefore the said *J. B.* executor as aforesaid, hath humbly besought us to provide him a proper remedy in this behalf; and we being willing, that what is just and right should

To be signed
and sealed, with
Messrs. *Provoost*
and *Webb.*

^b Intestate and
administration of
all and singular
the goods, chat-
tels, rights and
credits, which
were of the said
S. at the time of
his death, was
by *Thomas*, by
Divine Provi-
dence Arch-
bishop of *Canter-*
bury, primate of
all *England*, and
be metropolitan,

committed and
granted to J. B.
to wit, at
as by the said
J. B. we are
given to under-
stand, &c.
¶ *Wils.* 235.

be done, *command* you that, by good and lawful men of your bailiwick, you make known to the said J. H. that he be before us at *Westminster*, on next after to shew if any thing he has or knows to say for himself, why the damages in the said action ought not to be *assessed and recovered* by the said J. B. executor as aforesaid, according to the form of the statute in such case made and provided, if it shall seem expedient for him so to do; and further, to do and receive what our said court before us, shall then and there consider of him in this behalf; and have there then the names of them by whom you shall so make known to him, and this writ. *Witness; &c. Stormont and Way.*

Of Defendant's Appearance.

The defendant appears by *delivering a note in writing to plaintiff's attorney*, and a memorandum or minute on a 2s. 6d. stamp must be filed, and the proceedings are not in this case to be filed with the clerk of the papers, but delivered to the attorney on each side.

Declaration.

If defendant ap-
pears it is done
by a notice.

London, (ss.) Our lord the king sent to his sheriffs of *London* his writ, closed in these words, to wit, (*here set forth the two sci. fa.'s as far as the return of the second, exactly as on the roll*), then say: And the said J. being solemnly called, comes by J. T. his attorney, and thereupon the said J. B. executor as aforesaid, prays that the damages in the said action may be assessed, and be recovered by him the said J. according to the form of the statute in that case made and provided; and the said J. brings into court here the letters testamentary of the said S. J. whereby it fully appears to the court here, that the said J. B. is executor of the last will and testament of the said S. and hath the administration thereof, &c.

If no appear-
ance, how to
sign judgment.

If the defendant does not plead after the rule is expired, then sign judgment as in common cases on a 2s. 6d. stamp, and give notice of executing the writ of inquiry, and proceed to final judgment as in

in other cases. *Vide* the form of the writ in *Lilly's Entries* 609.

After final judgment is obtained on the inquiry, enter the same on the *scire facias* roll; therefore sup-
 posing it to be carried in, take the inquisition to *Westminster* for that purpose, pay 2s. 6d. the award of the inquiry, inquisition, and final judgment is to be added.

How to make
 the entry after
 final judgment.

George the third, &c. To the sheriff of *Middlesex*,
 greeting: Whereas *A. B.* lately in our court before
 us at *Westminster*, by bill without our writ, impleaded
C. D. being in the custody of the marshal of our
Marshalsea before us: For that whereas (here go to
 the end of the declaration) to the damage of the
 said *A. B.* of 20l. as he said, and thereupon he
 brought suit, &c. and such proceedings were there-
 upon had in our said court before us at *Westminster*,
 that afterwards, to wit, in *Hilary* term last past, it
 was considered by our said court before us, that the
 said *A. B.* ought to recover his damages by occasion
 of the premises; but because it was unknown to our
 said court before us, what damages the said *A. B.*
 had sustained by occasion of the premises aforesaid;
 we therefore commanded you, that by the oaths of
 twelve good and lawful men of your bailiwick, you
 should diligently inquire what damages the said *A. B.*
 had sustained, as well by occasion of the said
 premises, as for his costs and charges by him about
 his suit in that behalf expended, and that you should
 send the inquisition which you should thereupon take
 to us at *Westminster*, on next after
 under your seal, and the seals of those by whose oath
 you should take the said inquisition, together with
 that writ. The same day was given to the said *A. B.*
 &c. as by the record and proceedings thereof, re-
 maining in our court before us at *Westminster*, ma-
 nifestly appears; and the said *C. D.* after interlocu-
 tory judgment had been given in form aforesaid,
 and before any inquisition taken on our said writ of
 inquiry by us to you sent, for the purpose afore-
 said, died intestate, and administration of all and
 singular

Scire facias
 against an admi-
 nistrator of the
 defendant, dying
 after interlocu-
 tory judgment.

singular the goods, chattels, and credits of the said *C. D.* hath been granted to *M. D.* the widow and relict of the said *C. D.* as we have been given to understand and be informed; and because we being willing that those things, which in our said court before us should be duly executed, we command you, that by good and lawful men of your bailiwick, you make known to the said *M. D.* administratrix as aforesaid, that she be before us at *Westminster*, on next after to shew if any thing she has, or knows, to say for herself, why the said damages in the said action ought not to be assessed, and by the said *A. B.* recovered, according to the form and effect of the statute in such case made and provided, if it shall seem expedient for him so to do, and further to do and receive what our said court before us shall then and there consider, &c. (*as in the other*). *Vide Salk. 315.*

Proceedings against Bail.

THE bail stipulate by their recognizance in this triple alternative, *That the defendant shall, if condemned in the action, satisfy the plaintiff his debt and costs; or, that he shall surrender himself a prisoner; or, that they will pay it for him:* and when judgment is obtained, they stand liable to perform this contract, and may be compelled so to do; but before any immediate proceeding can be had against them, a *capias ad satisfaciendum* must be sued out against the defendant, into the county where the original action is laid, and left for a return of *non est inventus* by the sheriff of that county in his office, four days exclusive of the return day; the bail not being bound to render the principal, until they know what execution the plaintiff chuses to take out. 3 *Burr. 1360. Salk. 559.* No execution but a *ca. ja.* has effect to fix the bail, all others aiming at satisfaction by a seizure of the defendant's property, whereas this writ amounts to a demand on him to surrender himself a prisoner, which if not done by the return thereof, the bail (who may, on their own authority, take the defendant

ant into custody, and by surrendering him discharge themselves) having, it is presumed, made their election to perform the condition of their recognizance. The recognizance being thus forfeited, the plaintiff may either bring his action of debt thereon, or proceed by *scire facias* against the bail, commanding them to shew cause why the plaintiff should not have execution against them for his debt and damages.

But before a *sci. fa.* is sued out, or *action commenced*, it is necessary to make an entry of the recognizance with the clerk of the judgments; and the roll ought to be docketted, and carried in, the form of which see afterwards. How to proceed.

How to proceed by Action.

The only difference in the commencement of this By action. action from that of all others by bill is, that the following *ac etiam* must be inserted in the body of the *latitat* or other process issued on this occasion, notwithstanding the defendants are not arrested thereon, but only served with copies, *viz.* in pursu- Ac etiam. ance of *R. E.* 15 *Geo.* 2. after the words in a plea of *trespass*, there shall be inserted the following clause, "and also to a bill of the said plaintiff, against the said defendant, in a plea of debt upon recognizance, according to the custom of our court, before us to be exhibited." Otherwise the defendant, or his attorney, shall not be bound to accept a declaration in debt upon such recognizance. *Ibid.*

If this clause was not inserted, it would be a surprise on the bail, who, not knowing the cause of action, may let slip the time allowed them to surrender the defendant, and thereby discharge themselves. The bail cannot be arrested, let the amount of the debt be what it may.

The rest of the proceedings are the same as in *Venue*, other cases, only that the venue is to be laid in *Middlesex.* *Salk.* 564. 600. 659. Suing the bail below pending error in parliament, is a contempt and breach of privilege. 1 *Peere Will.* 685.

A *ca. fa.* by original must have 15 days between *Teste* and return the *teste* and return to charge bail. *Stat.* 13 *Car.* 2. of *ca. fa.*

c. 2. If by bill, *eight days is sufficient.* Salk. 599. 602.
Ld. Ray. 1177.

Time of render when sued by Action.

Time of rendering the principal where bail are sued on their recognizance.

It is ordered that if any person or persons being, or hereafter shall become, bail or manucaptors in this court, for any defendant in any action whatsoever, and shall be impleaded by action of debt upon the recognizance in such suit acknowledged, such person or persons shall have liberty to render such defendant into the custody of the marshal of this court by the space of *eight entire days in full term, next after the return of the writ of latitat, or other process,* sued out against such bail; and upon notice thereof given to the plaintiff or his attorney (in the suit aforesaid), all further proceedings against such bail or manucaptors upon the recognizance aforesaid, shall cease. *R. Trin. 1 Anne.*

If four days in term.

If there be but *four days* in term after the return of the writ, the defendant shall have *eight entire days* in the next term to render. The case in *1 Ld. Raym. 721.* was before the above rule, where it was ruled otherwise.

Bail liable for so much as in the affidavit, though the plaintiff declares for, or recovers more than the process.

It is ordered, that where the plaintiff declares for, or recovers a greater sum than is expressed in the process on which he declares, the bail *shall not be discharged,* but be liable for so much as is *sworn to,* and indorsed on the said process, or for *any lesser* sum which the plaintiff in such action shall recover. *R. E. 5 Geo. 2.*

Explanation.

By this rule, no person being bail in court or before a judge shall, upon a recovery against the defendant, be answerable for any greater sum or sums than sworn to, or indorsed on the writ or process on which the defendant was arrested (although one part of the condition of the recognizance is to pay the whole condemnation money, if the defendant does not); and if a greater sum be recovered, he shall not be discharged, but shall be liable for such sum or sums as shall be sworn to, or indorsed, or any lesser sum

sum that shall be recovered against the defendant in such action wherein he became bail, together with costs of suit. *N. on the above Rule.* And the court said proceedings on the recognizance, on payment of the debt sworn to, and costs. *Jackson v. Hassell.* Dougl. 330.

How to proceed by Scire Facias.

The regular mode of proceeding against the bail by *sci. fa.* by bill is, first get the bail-piece from the judge's chamber's (if not already taken away), and take the same to Messrs. *Provost* and *Webb*, who file it, pay them 4d. per term. But if the bail be justified in court, then get the same of the master's clerk, pay him 1s. and file it with *Provost* and *Webb* (copy it first), and only proceed against those that justified (if there are more on the bail-piece), as they who did not justify may get leave to be exonerated *nunc pro tunc.* 4 Burr. 2107. *Humphry v. Leite.* Then enter upon the roll, the declaration and recognizance of bail, with a memorandum of the term the declaration is of; which is to be docketed and filed in the treasury chamber; in this case you will be obliged to pay a *post docket*, therefore get a number roll as of the term the declaration is of, at Mr. *Way's* office, pay 4s. 8d. and make a docket paper thus:

Entries of A. B. gentleman, one, &c. of the term of the Holy Trinity, 31 Geo. 3. 1790.

Middlesex^a. Entry of a recognizance of bail between J. A. plaintiff against C. D. and E. F. bail of J. C. ^{a Where the venue is laid.} Roll. 860.

But if you have already carried in any rolls of that term, then your docket must be "the further entry of, &c." Take the roll to the clerk of the judgments, and he will enter the recognizance, pay 2s. and mark the roll, for which pay 1s. more, if for a further entry; if not 3s. for the docket, then take it to the treasury at *Westminster*, and file it.

Roll and *ca. fa.*
need not be filed
till replication.

The carrying in the roll is now dispensed with, but not the entry, and it seems if it is filed any time *before replication*, it will be sufficient, if the bail plead *nul tiel record*; nor is there any occasion to file the *ca. fa.*, till replication. 3 Burr. 1360. *Hunt v. Coxe.*

As yet of the term of the Holy Trinity, 31 Geo. 3. 1790. Witnesses Lloyd lord Kenyon.

Entry of recog-
nizance of bail.

London, (fs.) Be it remembered, That on Friday next after the morrow of the Holy Trinity in this same term, before our lord the king at Westminster, comes John Denn, by J. K. his attorney, and brings into the court of our said lord the king, before the king himself now here, his certain bill against Richard Fenn, being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea of trespass on the case; and there are pledges for the prosecution, to wit, John Doe and Richard Roe; which said bill follows in these words, to wit, London, (fs.) here enter the declaration to the words "suit, &c."

Recognizance of
bail.

And the said *Richard Fenn*, by J. K. his attorney, comes and defends the wrong and injury, when, &c. and thereupon *John Frost*, of, &c. and *Richard Mills*, of, &c. (the bail and addition exactly as in the bail-piece) came into the court of our said lord the king, before the king himself at Westminster, in their own proper persons, and became pledges and bail for the said *Richard*; and each of them became pledge and bail for the said *Richard*; that if it should happen that the said *Richard* should be convicted, at the suit of the said *John*, in the plea aforesaid, then the said bail consented, and each of them consented, that all such damages as should be adjudged to the said *John* in that behalf, should be made of their and each of their lands and chattels, and levied to the use of the said *John*, if it should happen, that the said *Richard* should not pay the said damages, or render himself to the prison of the marshal of the Marshalsea of our lord the king before the king himself on that occasion.

As

As soon as the entry of the recognizance is made *Sci. fa.* how and entered, and the *ca. fa.* returned by the sheriff, sued out by bill, prepare a *sci. fa.* against the bail (*which must be issued in Middlesex, although the action was laid in London.* 1 Burr. 409. Bond v. Isaac. Salk. 600. 659. And if there are fifteen days between the *teste* of the first, and return of the second by bill, it is sufficient, without regard to the number of days between the *teste* and return of each. Str. 1139.). Ingross it on a 2s. 6d. stamped parchment; Messrs. *Provost* and *Webb* sign it, pay 1s. 8d. seal 7d. It may be tested on the return day of the *ca. fa.* if by bill, if by original, on the *quarto die post* of the return day; leave it at the sheriff's office for a return of *nihil*; (if you mean not to summon the bail,) pay 2s. On the return day, *Alias & teste.* sue out an *alias, teste* it on the return day of the first *sci. fa.* sign and seal it, and leave it (*four days exclusive before the return*) at the sheriff's office, who will return it. *Vide R. E. 5 Geo. 2.*

But if you have only one *sci. fa.* which is to be If only one returned *scire feci*, get a summons thereon from the *sci. fa.* sheriff, directed to an officer, who will summons the bail; and the summons is good, if left on the day of the return *sedente curia*; but this *sci. fa.* is to be left in the sheriff's office *four days exclusive before the return.* R. E. 5 Geo. 2. Pay for summons 2s. 4d. Officer for summoning each 5s.

George, &c. To the sheriff of *Middlesex*, greet- *Sci. fa.* in case. ing: Whereas *John Denn*, lately in our court before us at *Westminster*, by bill without our writ, and by the judgment of the same court, recovered against *Richard Fenn*, 25*l.* for his damages which he sustained as well by reason of the not performing be in debt, say, certain promises and undertakings made by the said *Richard* to the said *John*, as for his costs and charges "as well a certain debt of 100*l.* as also 20*l.* for his damages which he had sustained by as well by means of the detaining the said debt, as for his costs

" and charges
 " by him about
 " his suit in that
 " behalf expend-
 " ed, whereof
 " the said Ri-
 " chard is con-
 " victed, as,
 " &c." and say
 afterwards, debt
 and damages.

b As well the
 said debt, as all
 such damages.

c Debt and da-
 mages.

d If an alias, say
 " as before we
 " have com-
 " manded you."

e debt and

Mills, of, &c. lately, (that is to say) in *Trinity* term, in the 31st year of our reign, in our said court before us at *Westminster*, came personally in their own proper persons, and became pledges and bail, and each of them became pledge and bail, for the said *Richard*, that if it should happen the said *Richard* should be convicted at the suit of the said *John*, in the plea aforesaid, then the said *John Frost* and *Richard Mills* consented, and each of them consented, that^b all such damages as should be adjudged to the said *John*, should be made of their, and each of their lands and chattels, and levied to the use of the said *John*, if it should happen that the said *Richard* should not pay the said damages, or render himself to the marshal of our prison of the *Marshalsea* before us, on that occasion, as by the record of the said recognizance now remaining in our said court before us at *Westminster* fully appears. Yet the said *Richard* hath not yet paid the said damages^c, or any part thereof, to the said *John*, or rendered himself to the marshal of our prison of the *Marshalsea* before us on that occasion, as we have received information from the said *John*; wherefore the said *John* hath humbly besought us to provide him a proper remedy in this particular; and we being willing that what is right and just should be done, command you^d, that by honest and lawful men of your bailiwick, you make known to the said *John Frost* and *Richard Mills*, that they be before us at *Westminster*, on next after to shew if they have or know, or either of them hath or knoweth, of any thing to say for themselves or himself, why the said *John* ought not to have his execution against the said *John Frost* and *Richard Mills* for the^e damages aforesaid, according to the force, form, and effect of the said recognizance, if it shall seem expedient for him so to do, and further to do and receive all and singular those things which our said court before us, shall then and there consider of them in this behalf. And have there then the names of those by whom you shall so cause
 it

it to be made known to them ; and this writ. Wit-
ness, &c.

Stormont and Way.

Middlesex, sci. fa. for *John Denn* against *John Præcipe*.
Frost and *Richard Mills*, bail of *Richard Fenn*, for
25*l.* damages, returnable on next after

J. K. attorney.

The *scire facias*, if it be by bill, must be return-
able on a day certain; by original, on a general re-
turn day, *ubicunque*. 2 *Lill*. 499.

On the return day of the first *sci. fa.* if it be re-
turned *scire feci*, or on the return day of the *alias*,
if returned *nihil*, give a rule thereon, which is
wrote on a piece of plain paper thus : “ *Denn* against
“ *Frost* and another bail of *Fenn*. Rule on *sci. fa.* ”
The clerk of the rules enters it, pay 1*s.* 10*d.* it
expires in four days exclusive (*Sunday*, or a *dies Sunday*,
non, no day) ; having got the return from the sheriff,
enter a part of the first *sci. fa.* as far as the sum re-
covered on the roll, take same to the clerk of the
judgments, who will enter and mark the roll, pay
2*s.* an execution may then be sued out against them,
either a *fi. fa.* or a *ca. fa.* *Str.* 1139. *Elliot v. Smith*.
1 *Lev.* 225. And though the *sci. fa.* be against
both, yet execution may be levied on one. 1 *Sid*.
339.

Rule for judg-
ment, if by bill.

But if there be a *nihil* returned on the first *sci. fa.*
then no rule is given, until the return day of the
alias.

Middlesex, (s.) Our lord the king sent to his
sheriff of *Middlesex* his writ closed in these words,
to wit, *George, &c.* (copy to the end of the first
sci. fa.) At which day before our lord the king at
Westminster came the said *John Denn*, in his proper
person, and the sheriff, to wit,

Entry of two *sci*,
fa.'s and *nihil*
thereon, by bill.

and , sheriff of the said
county, returned to us, that the aforesaid *John*
Frost and *Richard Mills* had not, or had either
of them any thing in his bailiwick, where or by
which he could give them or either of them no-
tice, as by the said writ he was commanded, nor
were they, or was either of them, found in the same :

G g 3

Therefore,

Award of the
alias.

* The return of
the alias.

Defau't of bail.

Judgment on
the *sci. fa.*

If only one *sci.*
fa. returned *sci.*
feci. how to
enter it.

Judgment.

^b debt and

Therefore, as before it is commanded to the said sheriff, that by good, &c. he make known to the said *John* and *Richard* that they be before our lord the king at *Westminster*, on^a next after to shew in form aforesaid if, &c. and further, &c. the same day is given to the said *John Denn* there, &c. At which day before our said lord the king at *Westminster*, came the said *John Denn*, in his own proper person, and the sheriff as before returned, that the said *John Frost* and *Richard Mills* had not, or had either of them any thing in their bailiwick, where or by which he could give them or either of them notice, as by the said writ he was commanded, nor were they, or was either of them, found in the same. And the said *John Frost* and *Richard Mills*, although on that day solemnly required, came not, nor did either of them come, but made default. It is therefore considered that the said *John Denn* have his execution against the said *John Frost* and *Richard Mills* of the damages aforesaid, according to the force, form, and effect of the recognizance aforesaid, by the default of the said *John* and *Richard*, &c.

If there be only one *sci. fa.* and it is returned *sci. feci.* stop at the end of the sheriff's return, and then say: "And the said *J. F.* and *R. M.* although on that day solemnly required, did not, nor did either of them come. It is therefore considered that the said *John Denn* have execution against the said *J. F.* and *R. M.* of the ^b damages aforesaid, according to the force, form, and effect of the said recognizance, by the default of the said *John* and *Richard*, &c."

If 2 Sci. Fa.'s be of different Terms.

If two *sci. fa.'s*
of different
terms, how to
enter them.

If there be two *sci. fa.'s* issue of different terms, the *first* must be entered of the *term* wherein it is *returnable*, and an award of the second is sufficient, without setting it forth at large; *N. on R. 5 Geo. 2.* docket it, and let the clerk of the judgments mark the

the first writ at the time of the docket; this will save a post term; and in the next term on the return of the *second*, the clerk of the treasury will enter the award of the judgment on the same roll, after the rule is expired.

How to appear.

If the bail appear, which is frequently the case, How to appear. to get a term of the plaintiff, it is done by a note in writing, and there are no costs to be paid by them, unless they plead. 8 & 9 W. 3. c. 10. s. 3.

If they appear, deliver a declaration upon treble If bail appear, declare. rd. give a rule to plead, and demand a plea as in other cases; if the declaration be not delivered *four days exclusive* before the *end* of the term, the defendant will be entitled to an imparlance.

Michaelmas term, in the 32d year of the reign of king George the third.

Stormont and Way.

Middlesex, (si.) Our lord the king sent to his Declaration. sheriff of *Middlesex* his writ closed in these words, to wit, George the third (*copy the first sci. fa. and the return, to Stormont and Way, and the award of the second as far as the sheriff's return;* the same day is given to the parties aforesaid, &c. (*then go on thus :*) At which day before our lord the king at *Westminster*, came as well the said *John Denn*, in his proper person, as the said *John Frost*, and *Richard Mills*, by *G. D.* their attorney, upon which the said *John Denn* prays, that execution may be adjudged to him, of the damages aforesaid, according to the force, form, and effect of the said recognizance, &c.

The declaration may be intituled of the term *generally*, although the *sci. fa.* was returnable the last return of the term. 3 Wils. 154. How to intitle the declaration.

What Bail may plead in Discharge.

The bail may plead that *no sci. fa. ever issued* What the bail against the defendant *secundum cursum curiæ*; that may plead.

"he died before the *ca. sa.* was returnable," Roll. Abr. 336.; that the plaintiff had other execution against him; that the defendant paid the money recovered, 1 Roll. 336. l. 31. 4 & 5 Ann. c. 16. s. 12. or a render of the principal, 3 Lev. 352. But they cannot plead, that the principal died before the return of the *sci. fa.* because if he died on the return day of the *ca. sa.* the bail are liable. 2 Wils. 67. They may plead *nul tiel record*, or a release to the defendant. 1 Roll. 336. l. 35. Thompson's Ent. 385. The four, Brev. 265. 2 Mod. 312. Latch. 149. Roll. Rep. 897. Lord Ray. 156.

How replication ought to conclude to a plea of *sci. fa.*

To a plea of *sci. fa.* against bail, that the principal died before the return of the *ca. sa.* a replication stating a particular *ca. sa.* and that the principal was alive at the return of that *ca. sa.* must conclude with an averment. *Henderson v. Witby*, Term Rep. 2 K. 576.

Bail below not liable to costs, in error.

If there be error brought by the principal, which is afterwards nonprossed with costs, yet the bail in the original action are not liable to the costs, because they only became bound in that action.

How to proceed when taken by Original.

How to proceed by original,

The *ca. sa.* must be returnable on a general return-day, *ubicunque*, &c. and must have fifteen days between the *teste* and return. Stat. 13 Car. 2. c. 2. This is much easier than the other, as the filacer (Mr. Adams in Pump Court) enters the recognizance, and docket the roll; therefore, after your *ca. sa.* is returned *non est inventus* against the principal, take it to him for the *sci. fa.* who will make it out, pay 6s. 2d. seal 7d. leave it at the sheriff's office: when it is returnable, apply to sheriff for it; if *nihil* is returned, then make out an *alias* yourself, which is a copy of the first, except "therefore we command you as formerly we have commanded you," being added; sign it with Messrs. Provost and Webb, pay 1s. 8d. seal 7d. N. B. The filacer does not make out the *alias*, and this agrees with

with the practice in the C. P. the prothon. signs the *alias*, and not the *filacer*.

After the return of the second *sci. fa. nihil*, or of one *sci. feci*, give a rule on the *sci. fa.*, as before, on the *quarto die post* of the return-day, at the clerk of the rules, which expires in four days after that day (Sunday or a *dies non* excepted); then enter the same on the roll (if no appearance), and take it to the clerk of the judgments, who enters same, pay 2s.

Rule for judgment.

Of the Appearance.

If the bail appear to the *sci. fa.* they do it by a note in writing, delivered to the attorney for the plaintiff, as by bill, but remember they are fixed for the debt and costs in the original action. N. B. A memorandum or warrant should be filed.

Appearance.

It seems the *filacer* has received appearances for bail. But there never was an instance of C. B. being filed. I should file a warrant on a 2s. 6d. stamp with the person who signed the *alias*.

The condition of the recognizance by original differs widely from that by bill, as the former is in a penalty, and the latter generally to render; therefore it became a question, whether levying against the bail, the costs of the *sci. fa.* out of the penalty was legal; and it was held, that though equitable costs may be levied out of the penalty of a bond, yet it was too hard to suffer it to be levied against the bail; and the overplus money was restored to them. *Str. 826. Baldwin v. Morgan.*

Cannot levy costs on a *sci. fa.* against bail by original, though there is a penalty.

If execution issue against the bail, and no satisfaction from them, yet the plaintiff may take the principal. 2 Cro. 320. 549. 1 Sid. 107. If one of the principals be taken, and not the other, the bail are not discharged. 2 Lev. 195.

Principal may be taken.

Fi. fa. in case.

George the third, by the grace of God of Great

Ca. fa. in case.

George the third, &c. To the sheriff of Middlesex,

To be sealed only ingrossed on a 2s. 6d. stamp.

Great Britain, France, and Ireland, king, defender of the faith, &c. To the sheriff of *Middlesex*, greeting: We command you, that of the goods and chattels in your bailiwick of *John Frost* and *Richard Mills*, the bail of *Richard Fenn*, you cause to be made 40*l.* which *John Denn*, lately in our court before us at *Westminster*, recovered against the said *Richard Fenn*, as well by means of the not performing certain promises and undertakings lately made by the said *Richard Fenn* to the said *John Denn*, as for his costs and charges by him about his suit in that behalf expended, whereof the said *Richard Fenn* is convicted, as appears to us of record:

dlesex, greeting: We command you, that you take *John Frost* and *Richard Mills*, the bail of *Richard Fenn*, if they be found in your bailiwick, and safely keep them, so that you have their bodies before us at *Westminster*, on next after

to satisfy *John Denn* 100*l.* which the said *John Denn* lately in our court before us, recovered against the said *Richard Fenn* for his damages which he sustained, as well by means of the not performing certain promises and undertakings lately made by the said *Richard Fenn*, to the said *John Denn*, as for his costs and charges by him about his suit in that behalf expended, whereof the said *Richard Fenn* is convicted, as appears to us of record:

And whereupon it was considered in our same court before us, that the said *John Denn* have his execution against the said *John Frost* and *Richard Mills* for the said damages, costs, and charges, according to the force, form, and effect of a certain recognizance acknowledged by them the said *John Frost* and *Richard Mills* in our said court before us, for the said *Richard Fenn*, at the suit of the said *John Denn*, in the plea aforesaid, by the default of the

the said *John Frost* and *Richard Mills*, as likewise appears to us of record; and have you that money before us at *Westminster*, on

next after to render to the said *John Denn* for his damages, costs, and charges aforesaid; and have there then this writ. Witness, &c.

Stormont and Way.

and have you then there this writ. Witness *Lloyd lord Kenyon* at *Westminster*, the 13th day of *July*, in the 31st year of our reign.

Stormont and Way.

Testium fi. fa.

After the words (for the debt and damages aforesaid) say, "And our sheriff of *Middlesex*, at a certain day now past, returned to us, that the said *John Frost* and *Richard Mills* had not, or had either of them, any goods or chattels in his bailiwick, whereof he could cause to be levied the damages aforesaid, or any part thereof; whereas it is testified in our same court before us, that the said *John Frost* and *Richard Mills*, have sufficient goods and chattels in your bailiwick, whereof you may cause to be levied the damages aforesaid, and every part thereof; and have there then this writ. Witness, &c.

Testium ca. fa.

After the word (record) say, "And our sheriff of *Middlesex*, at a certain day now past, returned to us, that the said *John Frost* and *Richard Mills* were not, nor was either of them, found in his bailiwick, whereupon on the behalf of the said *John Denn* it is sufficiently testified in our same court before us, that the said *John Frost* and *Richard Mills*, lurk and secrete themselves in your county; and have then there this writ. Witness, &c.

Fi.

Fi. fa. in debt.

George the third, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, &c. To the sheriff of *Middlesex*, greeting: We command you, that of the goods and chattels in your bailiwick of *John Frost* and *Richard Mills*, the bail of *Richard Fenn*, you cause to be made 100*l.* which *John Denn*, lately in our court before us at *Westminster*, recovered against the said *Richard Fenn*, for a debt, as also 15*l.* 10*s.* which were awarded to the said *John Denn* in our same court before us, for his damages which he sustained, as well by occasion of the detaining the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said *Richard* is convicted, as appears to us of record:

Ca. fa. in debt.

George, &c. to the sheriff of *Middlesex*, greeting: We command you that you take *John Frost* and *Richard Mills*, the bail of *Richard Fenn*, if they be found in your bailiwick, and safely keep them, so that you have their bodies before us at *Westminster*, on next after to satisfy *John Denn* 100*l.* for a debt which the said *John Denn*, lately in our court before us at *Westminster*, recovered against the said *Richard Fenn*, as also 14*l.* 10*s.* which were adjudged to the said *John Denn* in our said court before us, for his damages, which he sustained, as well by occasion of the detaining the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said *Richard Fenn* is convicted, as appears to us of record:

And whereupon it is adjudged in our said court before us, that the said *John Denn* have his execution against the said *John Frost* and *Richard Mills* for the said debt and damages, according to the force, form, and effect of a certain recognizance acknowledged by them the said *John Frost* and *Richard*

Richard Mills in our said court before us, for the said Richard, at the suit of the said John, in the plea aforesaid, by the default of them the said John Frost and Richard Mills, as likewise appears to us of record :

And have you that money before us at West-
minster on next
after to render
to the said John, for his debt and damages aforesaid,
and have there then this writ. Witness, &c.
Stormont and Way.

What Time Bail have to render the Principal.

If the bail mean to acquit themselves of their recognizance entirely, and run *no hazard* of the death of defendant, then they must render him in their discharge, before the return of the *ca. sa.* as the death of the principal afterwards will not discharge them. 2 Wils. 67. 2 Cro. 165. Jon. 139. Str. 511.

But if they do not, then they have until the return day, if the proceedings be by bill, *sedente curia*, of the first *sci. fa.* if it be returned *sci. feci*, but if a *nihil* is returned thereon, then until the return day, *sedente curia*, of the second *sci. fa.* *N. on R. E.* 5 Geo. 2. And if the proceedings be by original, they have till the *quarto die post* of the return of the first *sci. fa.* if returned *sci. feci*, if not, then till the *quarto die post* of the return-day of the second. 4 Burr. 2134. 1 Wils. 270. If an action be brought, then eight days in full term, next after the return. R. Trin. 1 Ann.

How long the bail have to render, and when they are fixed.

A bankrupt attending the commissioners may be taken by his bail, and surrendered in their discharge. *Ex parte Gibbons.* 1 Atk. 511.

Per. cur. The bail ought to have rendered the defendant on the *quarto die post* of the return of the second *sci. facias* sitting the court, and a render after the rising of the court at a judge's chamber, is too late. *Simmonds v. Middleton.* 1 Wils. 270.

Render after court up, bad.

The

Rule to be construed strictly as to the time of render, and must be *sedente curia* on the return day of *sci. fa.* and not at the judge's chambers.

The court unanimously agreed, that it was right and necessary to adhere strictly to the established rules of the court relating to the time and manner of bail surrendering their principal. They held, that a surrender at about half an hour after eleven at night on the last day, (which was the last day of the term), without an *actual* bringing the defendant into court (which was then risen) or before a judge (none being accessible at that late hour) in order to have an *exoneretur* entered upon the bail-piece, was not sufficient; though it was so late at night as to render the doing this impracticable; and though the defendant was actually delivered to a judge's tipstaff, and even lodged in the King's Bench prison, that very night, which the bail swore was the utmost, that the very late notice they received from the sheriff of the *sci. fa.* (which was returned *scire feci*) gave opportunity to them to do. *Hunt v. Cox.* 3 Burr. 1360. 4 Burr. 2134. certified by Master Owen, that the bail has, by original, till the *quarto die post* to surrender (provided it be done *sedente curia*). *Bailey v. Smeathman.*

If he is in prison, how to proceed.

If the defendant be in the custody of any sheriff (other than London or Middlesex), the rule was that an *habeas corpus* might be moved for, and made returnable in court; but now this rule is disused, and the bail may have a *habeas corpus* either in term or vacation, directed to any sheriff or gaoler in whose custody the defendant is, to bring him before a judge returnable immediately, in order to render him in discharge of his bail. 3 Burr. 1876. *Bettesworth v. Bell.*

If defendant becomes a bankrupt and obtains certificate.

If the defendant becomes bankrupt, and obtains his certificate pending the action, and before the bail are fixed, he may, on application by summons, be discharged out of custody; or, if he is not surrendered, apply to have an *exoneretur* entered on the bail-piece by summons, which will be ordered upon producing the certificate. 1 Burr. 244. *Woolley v. Cobbe & al.*

Lord

Lord Mansfield. If the certificate is obtained before the bail are fixed, they shall be discharged : but if they are fixed, before the certificate is obtained, they remain liable. *Ibid.*

If defendant is convicted for felony, and pardoned If for felony. on condition of transportation, and a civil action is depending against him, the court will grant an *habeas corpus*, in order that he may be surrendered ; and in that case commit him to the marshal, and order an *exoneretur* to be entered, and then remand defendant to the gaol from whence he came. *Str.* 1217.

But if the felon is actually on board, the court will not grant a *habeas corpus*. *N. B.* Was he not on board, the *habeas* must be on the crown side. *4 Burr.* 2034. *Fowler v. Dunn.*

A soldier at large may be surrendered by his bail, Soldier. committed to the marshal, and *instantly* set at large. And an impressed man under the keeper of the *Savoy* may be brought up, committed to the marshal, and then he may be remanded back to the *Savoy*. *Bond v. Isaac.* 1 *Term R-p.* 339.

How to render Defendant.

THE name of the cause, and how far the plaintiff has proceeded therein, is material for the judge's clerk to have, if before declaration, the clerk should have the sum sworn to : defendant must be present, and the clerk will make out the *commitment* and *surrender*, for which pay 9s. 6d. if one cause, tipstaff 10s. 6d. and give him 3s. 6d. for the certificate of the surrender, which he will bring with him and deliver you : As soon as you have rendered the defendant, notice is to be given to the plaintiff's attorney, and affidavit of the service thereof shall be made, before the bail are discharged, otherwise such render is to be void. *R. Trin.* 1 *Ann.*

But it hath been held, that though notice is not given of the render, yet if plaintiff proceeds further against

How to render defendant.

Notice to be given of the render.

If not ; liable to costs, or shall not be delivered.

against the bail, that shall not vitiate the surrender; but the bail shall not be delivered, till they pay the costs. *6 Mod.* 238.

How to get an
exoneretur en-
tered by bill.

If by original
affidavit, to be
taken to Mr.
Adams.

When notice has been given to plaintiff's attorney of the render, make affidavit thereof, and swear same before a judge; go to the judge's clerk, where the bail-piece is filed, deliver him the affidavit, and he will give you the bail-piece: take same with the *certificate* of the clerk of the papers, to the master, and he will enter an *exoneretur* thereon: pay him 2s. 4d. file the bail-piece with Messrs. *Provost* and *Webb*, pay 4d.; as soon as the bail are exonerated, go to the clerk of the judgment office, and enter the *committitur* and *surrender* in the *Marshal's book*, which is absolutely necessary to be done. *1 Salk.* 98.

In the King's Bench.

Denn v. Fenn.

Notice of sur-
render.

Take notice, that the above defendant did this day surrender himself in discharge of his bail, and was thereupon committed by the honourable Mr. Justice *Buller*, to the custody of the marshal, &c. there to remain until, &c. Dated the day of

1791.

Your's, &c.

Affidavit of
service.

J. P. clerk to *J. D.* of, &c. gentleman, maketh oath and faith, that he did serve Mr. *J. K.* the plaintiff's attorney in this cause, with a true copy of the notice hereto annexed, by delivering the same to the clerk or servant of the said Mr. *J. K.* at his chambers in *Clement's Inn*.

There is no occasion for the form of the entry in the marshal's book, as you will see many there.

May take prin-
cipal on a
Sunday.

The bail may take the principal on a *Sunday*, and keep him till the next day, and then surrender him, *6 Mod.* 231. but they must stay with him, or take a note from him, consenting to stay at a lock-up-house, till a judge comes to town.

Of staying Proceedings against the Bail, where a Writ of Error is brought by the Principal before the Time expires for their Surrender.

The plaintiff recovered judgment against the principal and took out a *ca. sa.* and had a *non est inventus* returned : of this judgment error is brought, and two days after the plaintiff sues out a *sci. fa.* against the bail, who now moved to stay the proceedings upon the *sci. fa.* as is done in cases where, pending error, the plaintiff brings an action of debt upon the judgment ; insisting it was more reasonable in this case, because otherwise the bail might lose the advantage of discharging themselves by a surrender of the principal, which they can do at any time before the return of the second *sci. fa.* *Cur.* thought it reasonable that the proceedings should be staid, on the bails consenting, that if the judgment be affirmed, they would render the principal, or give judgment on the *sci. fa.* *Str.* 419. *Myer v. Arthur.*

Proceedings against bail staid, pending error by the principal.

It is now generally understood, that where error is brought by the principal within the time allowed by the court for the surrender of defendant by his bail, the court will, upon application, stay the proceedings against them until the writ of error shall be determined, *they undertaking to pay the plaintiff the damages recovered, or surrender him within four days next after the determination of the writ of error,* in case the same is in favor of the defendant in error. *Capron v. Archer, 1 Burr. 340.*

If bail apply within time, the terms to stay proceedings are, that they pay or render within four days after affirmance.

Per curiam. Where the bail do not apply to stay the proceedings pending error, till their time to surrender is out, we will not give them any time for that purpose ; but only *four days* to pay the money, *after the judgment is affirmed.* *Richardson v. Jelly, 2 Str. 1270.*

If they do not apply in time.

Plaintiff took out a *ca. sa.* 3d December, on 4th a writ of error was allowed ; notwithstanding which he called for a return of *non est inventus*, and then waiting

Writ of error stops all proceedings, against bail, so that you

H h

waiting

cannot call for
the sheriff's
return.

waiting till the writ of error was at an end, proceeded by *sci. fa.* against the bail. The whole proceedings were set aside for the ground of them, viz. the return of *non est inventus* was obtained after notice of the writ of error, which stopt all sort of proceeding. *Smith v. Nicholson*, Str. 1186. 2 Lord Raym. 1260.

Cannot get *ca. fa.* returned though error brought after it is left at the sheriff's office.

Ca. fa. lodged in the sheriff's office the 13th May; the 19th a writ of error was served; the 20th the plaintiff got the *ca. fa.* returned; and then brought his action on the recognizance. Lord Kenyon. The proceedings against the bail are clearly irregular; the sheriff could not make a return to the writ until the 20th, before which time the writ of error was allowed and served. Rule to set aside proceedings abs. *Perry v. Cambell & an.* 3 Term Rep. 390. Str. 867. *S. P. Sweetapple v. Goodfellow.*

Will not stay proceedings pending error, till bail put in.

But if a writ of error is brought by the principal, and no bail is put in, so as to make it an absolute *supersedeas*, the court will not stay the proceedings against the bail. Str. 781. *Hunter v. Sampson.*

If execution.

If plaintiff obtains execution on *scire facias* against bail, pending error, the court will not set it aside. Str. 526. *Fisher v. Emerton.*

Where no bail is required, the bail applying to stay proceedings must undertake for the costs in error.

After judgment on *sci. fa.* against bail, moved to stay execution, the principal having brought error, and the bail undertaking to pay the condemnation-money and the costs on the *sci. fa.* in four days after affirmance: but in this case there being no bail on the writ of error, the court made the bail undertake also to pay the costs on the writ of error, in case the judgment was affirmed: and said it was a favor they were asking, and they would make them submit to equitable terms. *Rifson v. Francis*, Str. 877.

When the court will not stay proceedings.

The defendants brought error in *K. B.* and afterwards in parliament, and then suffered a *non pros* on the first writ; after this, they moved to stay proceedings on the judgment pending the second writ, which the court refused, being vexatious. *En-*

twissle v. Shepherd. 2 Term Rep. 79. It is discretionary in the court. Similar applications were made and refused, it appearing that the writs of error were brought for the purpose of delay. *Ibid.*

If the bail undertake to pay the debt and costs within four days after *affirmance* in the *exchequer chamber*, and the judgment is *affirmed*, the defendant brings *error* in *parliament*, the plaintiff shall not have execution until the *affirmance* there, because that is the *final affirmance*. 5 Burr. 2819. *Kershan v. Cartwright.*

If they undertake to pay, and error is brought in the house of lords after, it is that *affirmance* which is meant.

The plaintiff obtained judgment, and defendant brought a writ of error, and transcribed, which remained undetermined; defendant was served with a writ on the judgment, and for want of plea, judgment against him by default, and execution issued, and the sheriff in possession. *Cur.* stayed the proceedings upon it, as it would be unreasonable that the plaintiff should proceed in executing a judgment, which would of course fall to the ground in case the original judgment should be reversed; but defendant was bound not to bring a bill in equity. 4 Burr. 2454. *Taswell v. Stone.* Str. 526.

Where there is judgment against the bail, court will stay proceedings till *affirmance* upon terms, though sheriff is in possession.

The bail will be discharged upon motion, if defendant becomes a peer pending the action. *Dougl. Rep.* 45. *Trinder v. Shirley.*

Peer.

The defendant's attorney signed a *cognovit*, and in it had consented that the bail should stand as a security for the debt. I moved the court for a rule to shew cause why that part of the *cognovit*, so far as to make the bail liable, should not be rescinded, and why the defendant's attorney should not pay the costs of the application; and on shewing cause, it appeared, that the bail were exonerated by the defendant's surrender in due time, and notice given. *Cur.* ordered that the bail should stand exonerated, and defendant's attorney to pay the costs of the application. *Simpson and another executrix v. Willet.*

Cognovit signed where defendant had consented that the bail should pay the debt: *cognovit* rescinded.

If two become bail in error, they cannot surrender the principal, though he become a bankrupt pending

Bail in error cannot surrender principal, ing

ing the writ of error, 1 *Term Rep.* 624. *Southcote v. Brathwaite*; for their recognizance is to prosecute the writ of error with effect, or pay the condemnation with costs. 2 *Cro.* 402. 3 *Mod.* 87.

Nonpros for not Declaring.

For not declaring.

THAT upon appearance to be entered in the term wherein the writ, bill, or process is returnable, unless the plaintiff in any such writ, &c. shall put into the court from whence such writ, &c. did issue, his bill or declaration, against the person so arrested, in some personal action or *ejectione firmæ* of lands or tenements, before the end of the term next following after appearance, that then a nonsuit for want of a declaration may be entered against the said plaintiff. And the defendant in every such writ, bill, &c. shall or may have judgment to recover costs. *Stat. 13 Car. 2. stat. 2. c. 2. s. 2.*

General rule plaintiff must declare in 12 months, but if he do not deliver declaration within two terms, he may be nonprossed.

By the general rules of law, a plaintiff must declare within 12 months after the return of the writ. But by the rules of the court, if he do not deliver his declaration within two terms, the defendant may sign judgment of *nonpross*. Though unless he take such advantage of the plaintiff's neglect, the plaintiff may still deliver a declaration within the year. *Orley v. Lee, Mr. J. Buller.* 2 *Term Rep.* 112. 3 *Term Rep.* 123. *Penny v. Harvey.* But if the matter should be under accommodation, or any thing should prevent the plaintiff's declaring within two terms, he may get a side-bar rule from the clerk of the rules for further time to declare (if defendant be not in custody), and must serve defendant's attorney with a copy thereof, pay 4s. 6d.

Bail must be filed in the term writ is returnable, or cannot nonpross.

The defendant did not file common bail within two terms, and plaintiff did not declare after the end of the second term; but before the third term, defendant filed bail, and entered a *nonpross*. On motion to set it aside, the master was of opinion, that a *nonpross* could never be signed, unless bail was filed in the term

term in which the writ was returnable. *Holmes v. White. E. 11 Geo. 3.*

If the defendant files common bail *within the term* How long to sign a nonpros by bill.
the writ is returnable, he has *twelve months after* to sign a nonpros; but he cannot do it at any time after.

If the action be *by original*, the defendant may By original;
sign his nonpros any time before the *essoign day of the third term*, without giving a rule to declare; but an appearance must be entered *the term in which the writ is returnable*, to intitle him thereto.

If the writ be joint, and the appearance several, If the writ be joint,
the defendant cannot sign several nonproffes. *Comyn*
74. 4 Burr. 2418. *Pryce v. Foulkes, et al.*

Latitat against four, and four non-suits signed, One cannot sign nonpros where there are several defendants.
held irregular, because the trespass is joint, and though plaintiff may count severally, yet it remains joint till severed by the court. *Salk. 455. Allington v. Vavasor.*

Writ against three, one arrested and put in bail, The like.
plaintiff not having declared within two terms, nonpros signed by him, the other two not having appeared. Court were of opinion, that in a joint action, the plaintiff could not be nonproffed by one, or some of the defendants *without the others.* *Powel v. White et al. Dougl. 169.*

The defendant and another were joined in the writ, When a nonpros may be signed against one in an action against two.
declaration filed *against the other only.* A nonpros was signed for not declaring by the present defendant, and held regular: and it was said, that there had been cases where notice of declaration, and even taking out a rule to declare against *one defendant only*, have been held sufficient severance of the action, so as to entitle the other to sign judgment of nonpros. *Roe v. Cock. 2 Term Rep. 257.*

If defendant removes the cause by *habeas corpus*, Cannot nonpros if removed.
he cannot nonsuit the plaintiff for not declaring, for the plaintiff is not bound to follow him. *Note on R. Mich. 16 Car. 2.* But he must declare in two terms. *Ibid.*

Nor can a prisoner.

If a prisoner is *superfeded* on filing common bail, he never can sign a *nonpros*, because he did not file bail in the term in which the writ was returnable.

Pending injunction.

A *nonpros* cannot be signed pending an injunction. *Bowser v. Price*, E. 20 Geo. 3.

Court refused to set aside a regular *nonpros*.

Court refused to set aside a regular *nonpros* against plaintiff who sued for a penalty on stat. of usury. It might have been a different consideration, in case the plaintiff had been the party really injured, and had sued in order to come at justice and reparation for such real injury. *Bennet qui tam, v. Smith*. 1 Burr. 401.

Ca. sa. or *fi. sa.*

The defendant may take out a *ca. sa.* or *fi. sa.* for the costs, or bring an action on the judgment. 1 Wils. 316. *Murray v. Wilson*.

Attorney ordered to pay costs,

The court have made an attorney pay the costs of a *nonpros* where he refused to produce his client, on an order obtained for that purpose, and an affidavit that he could find no such man as plaintiff. *Gwynn v. Kirby*. Str. 402. *Sayer. Rep.* 172.

May be set aside.

A *nonpros* may be set aside for irregularity on motion, but it must be on affidavit of the facts.

How to sign *nonpros*.

In order to sign a *nonpros*, get a roll, and enter thereon the warrant of attorney for the defendant only, and ingross the *nonpros* thereon; also ingross same on a double half-crown stamp paper, which being done, carry same to the clerk of the judgments, who signs it, pay him 3s.

As yet of the term of the holy Trinity, in the 31st year of the reign of king George the third. Witness, &c.

Nonpros for not declaring upon a bill of *Middlesex*.

Middlesex, (ss.) Joseph Jones puts in his place I. D. his attorney, at the suit of Charles Hobbs, in a plea of trespass.

2 Writ of *latitat*.

Middlesex, (ss.) Joseph Jones, according to the form of the statute in such case made and provided, was served with a precept^a of our lord the king, called a bill of *Middlesex*, issued out of the court of our said lord the king, before the king himself, directed to the sheriff of *Middlesex*, returnable on Wednesday next after fifteen days from the day of Easter now last past, to answer Charles Hobbs in a plea of trespass: and the said Joseph at that day appeared

appeared by *I. D.* his attorney, according to the form of the statute in such case made and provided; and the said *Charles*, in the aforesaid court of our said lord the king, before the king himself, at *Westminster* aforesaid, hath not declared by his bill, or declaration, in any personal action, or in ejectment, against him the said *Joseph*, before the end of *Trinity* term then next following, being the next term after the appearance of him the said *Joseph*: Therefore it is considered by his majesty's court here, that the said *Charles* take nothing by his said precept^b, but ^{b Writ.} that he be in mercy, &c. And it is further considered by the court here, that the aforesaid *Joseph* Judgment signed day of recover against the said *Charles* 33s. 6d for his costs 1791. and charges laid out by him, about his defence in this particular, by the court of our said lord the king here, adjudged to the said *Joseph*, and by his assent, according to the form of the statute in such case made and provided; and that the aforesaid *Joseph* have his execution thereof, &c.

If he was arrested "*put in the ac-etiam.*"

The costs are taxed at 33s. 6d. for service of ^{Action will lie} course, and if there be special bail, the master taxes ^{for costs.} the costs.

The plaintiff may also be *nonprossed* in any stage ^{Nonpros for not} of the suit, for not complying with the rules of the ^{replying, &c.} court, viz. not *replying* to the defendant's plea, not *surrejoining* to his *rejoinder*, not entering the *issue* when served with a rule within the time allowed for that purpose, which is a final judgment, and is signed on double half-crown stamp paper, the master taxes these costs also.

When a *nolle prosequi* may be entered on the record in an action against two, *vide title Record.*

Proceedings by Attornies.

IF an attorney sues *by original*, he waives his privilege; or if he sue in another's name, he does the same. 2 *Str.* 837. Therefore if he means

H h 4

to

to sue as a privileged person, he must issue out an attachment of privilege, which is signed by Messrs. *Provost* and *Webb*, who take nothing, seal 7d. and a *præcipe* is to be left in the office.

Attorney suing out an attachment of privilege against any defendants, to leave a *præcipe* with the signer of the writs,

It is ordered, that from and after the last day of this term, every attorney of this court who shall sue out any attachment of privilege against any defendants, shall leave a *præcipe* with the signer of the writs, with the *defendant's name*, not exceeding *four* in each writ, with the return and day of signing such writ, with the *agent's* or *attorney's name* who sued out the same; and all such *præcipes* shall be entered on the roll, where the *præcipes* of *latitat*, and all other writs issuing out of this court are entered; and the officer that signs the writs in this court, shall not sign such attachment till a *præcipe* be left with him for that purpose. *R. H. 20 Geo. 2.*

Attachment of privilege.

No memorandum necessary on a 2s. 6d. stamp.

George the third, &c. To the Sheriff of *Middlesex*, greeting: We command you, that you attach *Abraham Adams*, if he be found in your bailiwick, and him safely keep, so that you have his body before us at *Westminster*, on *Monday* next after the morrow of *All Souls*, to answer *A. B.* gentleman, one of the attornies of our court, before us, according to the liberties and privileges of such attornies, and other ministers of the same court, from time whereof the memory of man is not to the contrary used and approved of in the same, of a plea of trespass, and also to a bill of the said *A. B.* to be exhibited against the said *Abraham*, for 500*l.* upon promises, according to the custom of our court, before us, and that you have there then this writ. Witness *Lloyd* lord *Kenyon*, at *Westminster*, the 13th day of *July*, in the 31st year of our reign.

A. B. in person.

Stormont and *Wax.*

Bail for 250*l.* by affidavit filed.

To be ingrossed on a 2s. 6d. stamp parchment, and make a *præcipe* for the office, as in other cases, only call it an attachment of privilege. Held, that an attorney need not indorse his name on this writ. *Field v. Lewis. 4 Term Rep. 275.*

It seems that by *stat. 13 Car. 2. stat. 2. c. 2. s. 4.* there need no *ac-etiam* to be inserted in a writ of attachment; for though there be no particular cause of action expressed in the writ, the sheriff is not to discharge the defendant; but such lawful course is to be taken for security for appearance therein as heretofore used. *Vide 2 Wilf. 392.*

If the action is not bailable, then leave out the *ac-etiam*, and add the notice to appear to it, as in a *latitat*, or bill of *Middlesex*.

If the defendant appears, he files common bail with Mr. *Walter*, with a memorandum or warrant on a *2s. 6d.* stamp.

The declaration is engrossed on a treble *1d.* stamp paper, the form of which is as follows:

Middlesex, (fs.) A. B. gentleman, one of the at- Declaration.
tornies of the court of our lord the king, before the king himself, being, according to the liberties and privileges of the same court, used and approved of in the same, from time whereof the memory of man is not to the contrary, present here in court in his own proper person, complains of *Abraham Adams*, being in the custody of the marshal of the *Marshal-sea* of our lord the now king, before the king himself, of a plea of trespass on the case; for that whereas (*as in other cases; add pledges at the end*).
Vide title Declaration.

An attorney plaintiff is intitled to lay his *venue* Attorney may lay venue in *Middlesex*, and it cannot be removed without his consent. *Vide title Venue. 2 Salk. 268. 3 Term Rep. 572.* But an attorney defendant has not the privilege of changing the venue into *Middlesex*, when it is laid in another county. *Pope & ux. v. Redfearne un. &c. 4 Burr. 2027. 3 Mad. 280. Garth. 126.*

If an attorney delivers or files his declaration, When defendant and gives notice thereof, *four days exclusive before the* is to plead.
end of the term wherein the attachment is returnable, the defendant must plead as of that term, if rule to plead be given; and plea demanded. But if he does not deliver his declaration *four days before the end of the*
term,

Proceedings by Attornies.

term, or before the *effoign day* of the *subsequent term*, defendant will be intituled to an imparlance. *N. on R. M. 5 Ann.*

All the other proceedings are exactly as in common cases, and when an inquiry is issued, or execution, you stile him exactly as mentioned in the declaration.

N. B. Notice of trial or inquiry is the same as in other cases.

Proceedings against Attornies.

AN attorney has privilege to be sued only in the court where he is an attorney, and by bill; even as acceptor of a bill of exchange. *Doughl. 313. Comerford v. Price*, or for a debt under 40s. *Ibid. 381. Wiltshire v. Lloyd*. If he is sued by original, he may plead his privilege. *Ibid. 313.* and he ought also to sue in the same court. *1 Mod. 118.* He has privilege in an inferior court under 5*l.* *Dy. 287.* in a suit of *qui tam*, &c. *3 Lev. 398. Lut. 196. 1 Salk. 30. 453.* If plaintiff and defendant are both attornies of the same court, the proceeding is by bill, not by attachment to hold to bail. *Str.-1141.* He may be sued in this court for any sum, however small: but if sued as executor, &c. or jointly with others, he loses his privilege. *1 Vent. 298. Salk. 544.*

Attorney of C.B.
arrested here,
must put in bail,
if of this court
not,

In *Str. 864.* it is said, that an attorney of the C. B. arrested in this court, must put in bail, and plead his privilege. But if arrested in the *same court* wherein he is an attorney, he shall be discharged on common bail. *The Mayor of Basingstoke v. Bonner. 1 Wilf. 306. S. P.*

Same point,

In *1 Wilf. 298*, an attorney of this court was arrested by *latitat*, and held by the whole court, that it is a motion of course to discharge him on filing common bail. *Wheeler's case.* I find Mr. Justice Buller has done this often.

An

An attorney was arrested by *capias* on a *special original* out of the *same court*; held he is not intitled to his discharge on serving the sheriff with a writ of privilege, but must plead such privilege in abatement. *Crofsley v. Shaw.* 2 Black. 1085. If by special original he must plead.

It appeared that if the plaintiff had waited till the commencement of the term, the statute of limitation would have attached. A bill was filed in the vacation, and motion to set proceedings aside. Lord Mansfield. Public justice is concerned in this question. The master states the practice to be to file bills against attornies *in vacation*. Fictions are allowed against all the king's subjects for the *furtherance*, but never for the *hinderance*, of justice. Why should an attorney be in a different situation from other persons? *Rule to set aside proceedings discharged.* Lane v. Wheat. Dougl. 313. A bill filed in vacation held good.

Mr. J. Buller in *Camelford v. Price*, says, it must not be taken for granted that a bill against an attorney cannot be filed in vacation. Dougl. 314.

I understand the practice to be, if a bill is filed in vacation, otherwise than to avoid the statute of limitations, the plaintiff will not be allowed his costs if the action be settled before the ensuing term. If filed in vacation, no costs.

How to proceed.

The first step taken is, to prepare a bill against him (which is engrossed on a treble penny parchment), file it with the clerk of the declarations in the King's Bench office, with a memorandum or minute on a 2s. 6d. stamp, make a copy thereof on treble penny stamp paper, which deliver or leave at his house, with notice to plead thereto in four days (if it be filed four days exclusive before the end of the term), *if he lives within twenty miles of London*. If he lives above twenty miles from London, then to plead in eight days; or if the *venue* be laid in any other county. N. B. This is lately settled by Mr. J. Buller. If the bill be not filed, and a copy delivered within that time, he is entitled to an imparlance,

lance, and to plead *within the first four days of the next term.* *Vide N. on R. E. 5 Ann.* A copy of the bill being left with the *known agent* to an attorney, is a sufficient delivery, and he is bound to plead to it.

Trinity term, in the 31st year of the reign of king George the third.

Stormont and Way.

The bill

Middlesex, (fs.) A. B. complains of *C. D.* gentleman, one of the attornies of the court of our lord the king, before the king himself, present here in court, in his own proper person (for that where- as), as in other cases, "*and therefore he brings suit,*" &c. Pledges, &c.

I. K. attorney for the plaintiff.

Defendant in person.

How to indorse
on the back of
the copy of bill.

Indorse on your copy to be delivered to the de-
fendant thus, "*This is a true copy of a bill filed*
"*against you, as of this present Trinity term, and*
"*unless you plead thereto in*" four days from the date
"*hereof, judgment will be signed against you by de-*
"*fault.*" Charge nothing for the copy, as he is
not bound to pay for it.

2 or 3 days.

With whom to
be filed.

The bill is filed with the clerk of the declarations,
pay 4d. give a rule to plead, and demand a plea as
in common cases; and if defendant does not plead,
sign judgment, and execute a writ of inquiry, as
in other cases. A demand of plea is necessary. The
time for notice of trial or inquiry, is the same as in
other cases.

Issue, and what
he is to pay.

If he pleads, you make up the issue with a memo-
randum as in other cases. He must pay for his *own*
entries, on the issue being delivered, *viz.* plea, rejoinder,
&c. and should pay 1s. for the entry of the
general issue; but he is not bound to pay for the
plaintiff's entries.

If arrested in an
inferior court,
writ of privilege
good. 2 Black.
Rep. 1085.

If an attorney be arrested in an inferior court, he
may have a writ of privilege to release him; but be-
fore he signs the writ, a certificate must be obtained
from the master's clerk, Mr. Rymell, of his being
an attorney (or of the clerk of the warrants in C. P.
if he is an attorney of that court), pay nothing for

signing, seal 7d. take it to the clerk of the papers of the inferior court, who will get the judge to allow it, and order defendant to be discharged out of custody.

George, &c. To the judges of our court of our palace, and every of them, greeting: Whereas, as well by reason of our royal dignity, as by an ancient custom, according to the same for times past used and approved hitherto, it hath obtained, that all and every our attornies assigned to enroll pleas in our court before us elsewhere than in our same court before us, ought not, nor have they, from time immemorial, been used to be compelled to answer before any secular judges on any pleas or complaints. And whereas we have already received information by the complaint of C. D. gentleman, one of the attornies of our said court before us, that several ill-disposed persons, intending to disquiet the said C. D. have levied one or more plaint or complaints before you, against the said C. D. and threaten to arrest and detain him in your custody thereupon, whereby the said C. D. is unable to attend his said office as an attorney, upon several affairs and suits depending in our said court before us, which, if it is permitted, will manifestly take away, and be not only in derogation and diminution of the jurisdiction of our said court before us, and the liberties and privileges thereof, but also to the great detriment of the said C. D. and his clients. And because we are willing that the jurisdictions, privileges, and customs, for so long time used and approved of in our said court before us, should be inviolably kept and observed, we command you, and every of you, that you wholly desist from proceeding further before you, or any of you, in the complaints aforesaid, or any or them, and that you inform the party or parties, plaintiff or plaintiffs in those complaints, that he, she, or they, may prosecute the same in our court before us at Westminster, against the said C. D. if he, she, or they, shall think it expedient so to do. Witness, Lloyd lord Kenyon, Stormont and Way.

Writ of privilege, to be ingrossed on a 2s. 6d. stamp.

This

This writ will serve to any inferior court except in its direction: it must be directed right, or need not be obeyed. *Vide title Habeas Corpus.*

Court of conscience in London may hold plea against an attorney.

It does appear that the court of conscience in London, may proceed against an attorney, although he deliver his writ of privilege. This court has a mixed jurisdiction, as well equitable as legal, they proceed *secundum æquum et bonum*, and an attachment was denied. *Silk v. Rennett, un. &c. 3 Burr. 1583.*

How to Tax their Bills.

Attornies not to commence an action for fees till one month after delivery of their bills.

Judges to refer them to be taxed.

No attorney of this court shall commence any action for the recovery of any fees, charges, or disbursements, until one month after he shall have delivered to the party to be charged therewith, or left for him at his dwelling house or last place of abode, a bill of such fees, charges and disbursements, in a common legible hand, and in the *English* tongue (except law terms and the names of writs), and in words at length (except times and sums), subscribed with the proper band of such attorney. And upon application by the party chargeable by such bill, or any other in that behalf authorized, unto any judge of the court, &c. where the business, or the greatest part thereof in amount or value, was transacted, and upon submission of the party, or other person authorized as aforesaid, to pay the whole, that upon taxation what shall appear due to such attorney, the judge, &c. is required and empowered to refer the bill, and the whole of such demands thereupon (although no action be depending touching the same), to be taxed without any money being brought into court. And if the attorney, having due notice, shall refuse to attend such taxation, the officer may proceed *ex parte* (pending which reference no action shall be brought), and upon such taxation the party shall forthwith pay to the attorney the whole that shall be found due, and in default be liable to an attachment, or process of contempt,

tempt, or other proceeding, at the election of the attorney. And if upon such taxation it shall be found that such attorney has been over-paid, then the attorney shall forthwith pay to the party all such money as the officer shall certify to have been so overpaid; and in default, shall in like manner be liable to attachment, or process of contempt, or other proceeding, at the election of the party. And the court is to award costs of such taxation, according to the event thereof, viz. if the bill taxed be less by a sixth part than the bill delivered, the attorney is to pay the costs; if not less by a sixth part, the court at discretion shall charge the attorney or client according to the reasonableness or unreasonableness of the bill. *2 Geo. 2. c. 23. s. 23.*

If it appears he has been over-paid, &c. §

if less than a sixth, to pay costs; if not less, the client to pay.

Nothing in the said act contained shall extend to any bill of fees, charges, and disbursements, due from any attorney or solicitor to any other attorney or solicitor, or clerk in court, but that every such attorney, solicitor, or clerk in court, may use such remedy for recovery of his fees, charges, and disbursements, against such other attorney or solicitor, as he might have done before the making the said act. *12 Geo. 2. c. 13. s. 6.*

Not to extend to any bills of fees between one solicitor and another.

A bill may be wrote with such abbreviations as are commonly used in the *English* language. *Ibid. sct. 5.*

If an attorney refuses to deliver a bill to his client signed, he may take out a summons for that purpose before a judge; and if he does not on service attend thereon, an order will be made to deliver it within a reasonable time; which if he neglects delivering, upon making such order a rule of court, serving same, and making affidavit thereof, the court will grant an attachment, on motion.

Method to oblige an attorney to deliver his bill.

If the bill is delivered, then you may apply to a judge for a summons, to shew cause why it should not be referred to the master to be taxed, upon which an order will be made on the client's undertaking in the judge's book, "to pay the attorney what shall appear to be due to him upon such taxation;"

How to proceed to tax it.

if

if the attorney does not attend, an order will be made of course; you cannot have a summons to deliver and tax a bill together.

Get the master's appointment on the order, serve copy thereof, and if he will not attend the third time, the master will proceed *ex parte*.

If an attorney delivers his bill, and after his death it is taxed, and above a sixth part struck off, yet his executors shall not pay costs. *Str.* 1056.

Attorney cannot be changed, without leave of court.

An attorney cannot be changed by his client without leave of the court, or order of a judge, on payment of his bill as taxed by the master. *Dougl.* 217. *Macpherson v. Rorison.*

New attorney to take notice.

The new attorney must, at his peril, take notice of all subsisting rules in the cause. *7 Mod.* 50. *Lord Mansfield.* The bill of an attorney cannot be taxed at the trial of an action brought upon it, nor after verdict. If there has been an amount settled between the attorney and his client, the bill shall never afterwards be taxed as of course: particular cases may be pointed out; the client may by affidavit shew, that the business charged was never performed, or that the charges are fraudulent; but if the business was really done, the delay of the defendant for more than a month in objecting to the quantum is an admission, that he thinks that reasonable. *Hooper v. Till, Dougl.* 199. *S. P.* 198. *Williams v. Frith.*

Bill cannot be taxed at the trial.

If an attorney means to set off, he must deliver bill in time so as it may be taxed.

Court held, that though an attorney cannot bring an action on his bill, till it has been delivered a month, that circumstance is not necessary to enable him to set it off; that he must not produce it at the trial by surprize, but that it is sufficient in such case, to deliver it time enough for the plaintiff to have it taxed before the trial. *Martin v. Winder, cited in Dougl.* 199. notes.

Conveyancing and parliamentary business.

A bill for conveyancing and parliamentary business, and also causes in this court, was held liable to taxation. So where fees paid to a proctor for business done in the ecclesiastical court, and made part of the bill, the whole bill was referred, and the master might tax that part. *Ibid.*

If the whole bill is for conveyancing, it cannot be Convey. taxed. *Ibid.*

The court will not refer an attorney's bill, if all the business be done at the quarter sessions; *secus* if some part be done here. *Ex parte Williams.* 4 Term Rep. 124. No bill need be delivered signed in this case, before action. Mr. J. Buller, York assizes, 1786. *Ibid.*

In this action the plaintiff recovered a judgment against defendant for 182l. 10s. But defendant having also recovered in another action against the plaintiff and another, obtained a rule to shew cause why the debt and costs in the latter should not be set off against the judgment in the former, suggesting that Mitchell, the plaintiff, had absconded; *Bearcroft* shewed cause on behalf of Mitchell's attorney in the first action; contending, that as he was not concerned as attorney in the other action, he had a lien for his costs on the judgment obtained by his client; and observed that this was not such a debt as could be set off under the statute. Lord Kenyon said, that this did not depend on the statutes of set off, but on the general jurisdiction of the court over the suitors; that this was an equitable part of their jurisdiction, and had been frequently exercised. But as to the other part, attornies and solicitors of the different courts have a lien on all papers in their hands, and judgments recovered, for their costs; and he thought it right that the attorney in this case should be satisfied for his costs, before the defendant was allowed to make the set off. Buller J. Though this court have said that they will not interfere in the behalf of the attorney, and prevent the plaintiff from settling his own cause, without first paying the attorney's bill, yet when the adverse party against whom a judgment has been obtained, applies to get rid of that judgment, the court will take care that the attorney's bill is satisfied. *Rule absolute*, on defendant's undertaking to pay the attorney's bill, and on his entering a remittitur in the cause in which this defendant was plaintiff. *Mitchell v. Oldfield.* 4 Term Rep. 124.

Agent's bill may
be taxed.

An agent's bill may be referred to be taxed, provided his employer bring into court the sum remaining due on the amount of the plaintiff's claim, and that what should be deducted, if any thing, should be afterwards repaid to him. *Dougl. 200. in Notes. Ex parte Bearcroft.*

An executor may bring an action for his testator's bill *without signing it*, *Cooke's Rep. 58.* but such bill may be referred to be taxed on the defendant's undertaking to pay. *Mr. J. Aston, 1780.*

Proceedings against Peers.

Suits may be
prosecuted
against peers and
members,

Or against their
servants.

Proviso,

AT common law, it was not usual to proceed against peers of the realm, or members of the house of commons. But now, by statute 12 and 13 *W. 3. c. 3.* they may be sued by *original writ* as well as by *original bill* and *summons*. *Say. Rep. 63. Cowp. 844. 2 Ld. Raym. 1442. Sir. 734.* The plaintiff could not under this statute proceed against them whilst sitting in parliament; therefore to prevent delaying the king's subject, the statute 10 *Geo. 3. c. 50.* enacts, that any person shall and may commence and prosecute any action or suit in any court of record, or court of equity, or of admiralty, and in all causes matrimonial or testamentary, against any peer or lord of parliament of *Great Britain*, or against any of the knights, citizens, and burgesses, of the house of commons of *Great Britain*, for the time being, or against their or either of their menial servants, or any other person, intitled to the privilege of parliament; and no suit, action, &c. shall be staid by or under color or pretence of any privileges of parliament, provided that nothing shall extend to subject the person of any of the knights, citizens, and burgesses, or the commissioners of shires and burghs of the house of commons of *Great Britain* for the time being, to be arrested or imprisoned, upon any suit or proceedings. *s. 2.*

How to proceed by Original.

Prepare a *præcipe* for the curfitor of the county, who makes out the original, take a memorandum on a 2s. 6d. stamp or warrant, and annex thereto, pay fine to the king, and for the original writ, when sealed, take it to the sheriff who will make out a summons thereon, pay 2s. 4d. deliver it to your officer who will leave the summons at defendant's house. After he has summoned defendant, get the original summons returned, and delivered over to the office. Then get a return to the writ, pay 2s. If he does not enter his appearance within *four days* after the *quarto die post* of the return with the filacer, Mr. Adams, he will make out a *distringas* thereon, and sign same; pay according to length, seal 7d. get a warrant thereon at sheriff's office, pay 2s. 4d. give it to your officer, who will levy 40s. If no appearance be entered, on the *quarto die post* of the return, then get the writ returned, take it to Mr. Adams, and he will make out an *alias*, on which you may move the court to increase the issues, which may be done on producing the return to the *first distringas*; see to counsel 10s. 6d. Draw up the rule with the clerk of the rules, take same to the sheriff's office with the *alias*, and he will make out a warrant thereon for his bailiff to levy the amount ordered. If you have not obtained to the full amount of the debt and costs (which generally is given on the *alias*) you may proceed to get a return to the *alias* as before, and issue a *pluries*, move the court to encrease issues to the full extent of the debt and costs incurred, which will now be granted; draw up the rule, and deliver it with the *pluries distringas* to the sheriff, he will make out a warrant to his bailiff to levy the amount. Then, if no appearance is entered on the *quarto die post* of the return, proceed by getting a return thereto; and move the court (in pursuance of the Statute 10 Geo. 3. c. 50. s. 3. which enacts, that the court may order the issues levied to be sold, and

Officer's fee 10s.

Sect. 4.

the monies applied to pay such costs to the plaintiff as the court shall think just, and the surplus be retained until the defendant shall have appeared, or other purpose of the writ be answered; with this proviso, when the purpose is answered, then the issues shall be returned, or if sold, what shall remain of the money arising by such sale, shall be repaid to the party distrained on) for a rule to shew cause why the issues returned upon the several writs of *distringas* should not be sold, and the monies arising from the sale thereof, should not be forthwith brought into court, and why it should not be referred to the master to tax the plaintiff his costs occasioned by his issuing out the said several writs; and why the costs, when taxed, should not be paid out of the monies so brought into court, and why the surplus of the said money, after payment of the said costs, should not be retained in court, until the purpose of the said writs is answered; see to counsel, 10s. 6d. This is moved upon an affidavit of the several writs of *distringas* having issued, and the returns thereto, and that defendant hath not appeared; draw up rule, serve copy on sheriff, shew the original rule, move the court on an affidavit of the service and shewing the original rule, to make it absolute; draw up rule, serve copy on the sheriff, shew the original, and if he does not bring the money into court, he will be liable to an attachment. Make out bill of costs and tax them with the master. If defendant still holds out and does not appear, you may distrain him *ad infinitum*, until he does enter his appearance, and sell the issues from time to time.

Distrels *ad infinitum*.

It extends to all writs of *distringas*.

It very seldom happens that a defendant stands out so far in contempt.

In *Raban v. Plaistow*, the court held, that the stat. 10 Geo. 3. extended to all writs of *distringas*, and not confined to such as concern privilege only; and ordered the issues to be sold and the costs incurred to be taxed, and paid to the plaintiff, out of the money arising thereby, and the residue to be retained, in order to answer the event of the suit. 5 Burr. 272b. This was against the late sheriff.

Middlesex,

Middlesex, (ss.) If *A. B.* makes you secure, &c. *Præcipe* for origin. then put, &c. *John* earl of *Bath*, that he be before us on the morrow of *All Souls*, wheresoever, &c. to shew, for that whereas (here set forth the whole count or declaration), to the damage of the said *A. B.* of 500*l.* as he says, &c.

George the third, &c. To the sheriff of *Middlesex*, greeting: We command you that you distrain *John E. of B.* by all his lands and chattels in your bailiwick, so that neither he, nor any one for him, do intermeddle therewith, until you shall have other command in that behalf from us; and that you answer us for the issues of the same, so that he be before us on wheresoever we shall then be in *England*, to answer *A. B.* in a plea (to the end of the *præcipe*) to the damage of the said *A.* of 500*l.* and to hear thereof judgment of his many defaults; and have you there this writ. Witness *Lloyd* lord *Kenyon*, at *Westminster*, the 13th day of *July*, in the 31st year of our reign. *Adams.*

Appearance.

DEFENDANT is to appear four days after the *Appearance.* *quarto die post* of the first *distringas*, and to an alias or other *distringas* on the *quarto die post*. He enters it with *Mr. Adams*, by delivering it on paper thus: "*Middlesex, appearance for John earl of Bath, at the suit of A. B.; J. K. attorney.*"

Pay for entering 2*s.* 6*d.* and deliver a memorandum or warrant on a 2*s.* 6*d.* stamp, and if the 40*s.* has been levied, call on the officer for it, and he must return same, or get a certificate from *Mr. Adams* of defendant's appearance, produce it to the officer, if he will not pay, the judge will compel him by order, upon a summons for that purpose, though it was refused by *Mr. J. Gould*.

The plaintiff, in an action against a member, If the defendant had proceeded agreeable to 10 *Geo.* 3. and obtained appear after levy on *distringas*, rules for selling the issues levied upon a *distringas*, he shall pay the alias,

costs before he
has the money
returned.

alias, and pluries; and also for a rule for an attachment against the sheriff, but no issues had been actually levied; at length defendant appeared; whereupon it was moved that these rules should be discharged; for as no issues had been levied, they could not be sold, and as the defendant in the action had now appeared, the end and purpose of the writs were answered. On the other side, the plaintiff insisted on the costs of issuing the writs before the rules should be discharged. And the court thought that reasonable, and directed that on payment of costs the rules should be discharged. They were of opinion that these costs were not to attend the event of the suit, but were to be paid to the plaintiff at all events, whether he should finally succeed or not. 5 Burr. 2725. *Martin v. Townsend & an.*

The declaration.

Middlesex, (ss.) John earl of Bath was summoned to answer *A. B.* in a plea of trespass on the case, and whereupon the said *A. B.* by *J. J.* his attorney, complains *that whereas*, to the end of the *præcipe* (but both in the *præcipe* and *declaration* leave out these words) “*but contriving, &c. to deceive*” and *defraud the said A. B. in this behalf,*” for the lords have adjudged it a very high contempt and misdemeanor, in any person, to charge them with any species of fraud or deceit.

When to plead.

If the declaration be delivered *four days before the end of the term*, the peer must plead, if he lives within 20 miles of *London*, in four days, country 8 days. And I take it if he be in contempt, and afterwards enter his appearance, he is *not intitled to an imparlance*. I also think if he wants the issues returned, (and the sheriff refuses to pay him on the usual certificate), the court will lay him under terms of *pleading issuably, taking short notice of trial, &c.* for his laches; otherwise the plaintiff will be deprived of a term thereby, at a very easy expence.

When a peer is not entitled to an imparlance on an essoin call.

The plaintiff sued out a writ against a peer in a personal action, returnable the second return of *Easter term*. At the return, the defendant cast an essoin, which

which was not adjourned to any particular day; and on the first day of *Trinity* term the plaintiff delivered his declaration. Motion for an imparlance. *Buller J.* It was held, that a corporation was not entitled to an *essoign*, and that there could be no *essoign* in a personal action. When an *essoign* is cast, the parties should adjourn to a particular day; but as that was not done here, and as no motion was made to quash the *essoign*, the declaration could not be delivered till the first day of the term. But the defendant is not entitled to an imparlance, where the plaintiff is prevented from declaring before the *essoign* day, by an *essoign* cast. And the court will be glad to use any means to prevent such a delay by the defendant. *Rule disch. Rooke v. Earl of Leicester. 2 Term R. 16. 2 Wils. 164.*

An *essoign* lies not on a *capias* to arrest; and the plaintiff may declare, and sign judgment if no plea. *Barclay v. Earle. 2 Str. 1194.* Essoign lies not on original, when there is an arrest.

All the subsequent proceedings are the same as in other cases, only he cannot be taken in execution.

How to proceed by Bill.

The bill is a complaint in writing, describing the defendant as having privilege, *Say. Rep. 64.* and concludes praying process to be made according to the form of the statute, &c. It is ingrossed on treble penny parchment, and filed with the clerk of the declarations, annexing a warrant on a 2s. 6d. stamp; and the first process that issues thereon, is a *writ of summons* (which you will see in the proceedings against members of parliament) directed to the *sheriff of the county* where the *venue is laid*. And if he cannot be found there, I have no doubt you may issue a *testatum summons* into any other county; on which, if no appearance is entered on the 4th day next after the return, which in this case is made on a day certain, you may issue a *disfringas*.

Appearance.

A PEER must file common bail to a *distringas* returnable at a day certain, within four days next after the return-day, or an *alias* may issue on the next day, and to an *alias*, the very day of the return, or a *pluries* may issue, and so to all other writs of *distringas*.

N. B. A memorandum on a 2s. 6d. stamp is necessary.

A bill against a peer.

London, to wit. A. B. complains of John earl of Bath of a plea of trespass on the case, For that whereas (same as against a commoner).

Proceedings against Members of Parliament.

How to proceed against.

You may either proceed against them by *original*, or by *bill*; if by *original*, it is the same as against a peer; but if by *bill*, prepare a bill against him and ingross it on a treble 1d. stamp parchment, file it with the clerk of the declarations; if it is in vacation, and you want to sue him, you must file the bill, and intitle it as of the *preceding term*. A warrant on a 2s. 6d. stamp is to be filed with the bill.

The bill,

Middlesex, to wit. A. B. complains of C. D. esq; (having privilege of parliament) of a plea of trespass on the case, for that whereas, &c. as in other declarations, except in the conclusion, there leave out the words "*contriving and fraudulently*," &c. and therefore he brings his suit, &c. And hereupon the said A. B. prays the process of our lord the king, according to the form of the statute in such case made and provided, to him thereon to be made; and to him thereon it is granted, &c. Pledges, &c.

Pray process.

As soon as the bill is filed, issue out the following summons, which is to be ingrossed on a 2s. 6d. stamp parchment, signed by Messrs. *Provost* and *Webb*, pay 1s. 8d. and 7d. seal, sheriff for his summons 2s. 4d. officer for service 5s.

George

George the third, &c. To the sheriff of *Middlesex*, *Summons*.
greeting: We command you, that you cause to be
summoned *C. D.* esq; (he having privilege of parlia-
ment), that he be before us at *Westminster* on *Mon-*
day next after the morrow of All Souls, to an-
swer *A. B.* in a plea of trespass on the case, as he
shall be able reasonably to shew that he ought to
answer therein; and have there then this writ. Wit-
ness *Lloyd lord Kenyon*, at *Westminster*, the 13th day
of *July*, in the 31st year of our reign.

Stormont and Way.

Middlesex. Writ of summons for *A. B.* against *Præcipe* far
C. D. esquire (having privilege of parliament), re-
turnable on *Monday next after the morrow of All*
Souls.
J. K. attorney.

If defendant does not appear *within four days after* If no appear-
the writ is returnable, and the sheriff having returned ance.
him summoned, sue out the following *distringas*,
which is ingrossed on a 2s. 6d. stamp parchment,
signed by Messrs. *Provost and Webb*, pay 1s. 8d. seal
7d. warrant 2s. 4d. officer for the levy 10s.

George, &c. To the sheriff of *Middlesex*, greet- *Distringas*.
ing: We command you, that you distrain *C. D.* In the alias say,
esquire (having privilege of parliament), by all his "as before we
lands and chattels in your bailiwick, so that neither "have com-
he, nor any one for him, do intermeddle there- "manded you,"
with, until you shall have other command in that which is the
behalf from us; and that you answer us for the only alteration.
issues of the same, so that he be before us at *West-* The *distringas*
minster, on *Tuesday* next after the morrow of *Saint* ought to bear
Martin, to answer *A. B.* in a plea of trespass on *teste* the day the
the case upon promises, to the said *A. B.* his damage summons is re-
of 50*l.* and to hear thereof judgment of his many turnable, and
defaults; and have you there then this writ. Wit- any time be-
ness, &c. the return is
Stormont and Way. sufficient.

Middlesex. *Distringas* for *A. B.* against *C. D.* *Præcipe*.
esquire (having privilege of parliament) case, re-
turnable on *Tuesday* next after the morrow of *Saint*
Martin.
J. K. attorney.

If the defendant does not appear on the return *Alias*,
day of the *distringas*, then get return from the sheriff,
and

and issue an *alias*, and proceed as against peers to increase the issues.

File common bail.

But if he appears he files common bail, and also a memorandum or warrant on a 2s. 6d. stamp, with the clerk of the bails.

Testatum distringas.

If he has no goods whereby he can be distrained in the county where the venue is laid, get a *nihil* returned on the first *distringas*, and issue a *testatum* into the county where you intend to levy; go on in the former writ as far as "50l." then say, "and for that our sheriff of Middlesex, at a certain day now past, returned to us, that the said C. D. had not any thing in his bailiwick whereby he could cause to be distrained, as by the said writ he was commanded, whereas it is testified in our same court before us, that the said C. D. hath sufficient goods and chattels in your bailiwick whereby you can cause to be distrained; and have there then this writ." *Witness, &c.*

Vide Try's Jus Fillaxarii.

Appearance and declaration.

When defendant has appeared, deliver him a declaration as of the term the appearance is of, and if delivered four days exclusive before the end of the term, he must plead without imparlance. The declaration is ingrossed on a treble penny stamp paper, and is nothing more than a copy of the bill, only go as far as suit, &c. and add pledges; give a rule to plead as in other cases. He has the same time to plead as other persons; in town, or within 20 miles, four days; country, eight days, or above 20 miles.

Præcipe for original.

Middlesex, (ss.) If A. B. makes you secure, &c. then put, &c. Henry George, late of Westminster in the said county, esquire (having privilege of parliament), that he be before us on *quædam* wherefover, &c. to shew, *For that whereas.*

The other proceedings are the same as against peers, by original.

Corporations.

Corporations aggregate.

Corporations aggregate, consist of many persons united together into one society, and are kept up

up by a perpetual succession of members, so as to continue for ever; of which kind are a mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church.

Where a corporation is plaintiff in a civil action, leave to inspect their books is granted to the defendant of course. *The Mayor of Lynn v. Denton*, 1 Term Rep. 689.

Corporations sole, consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a sole corporation: so is a bishop: so are some deans and prebendaries, distinct from their several chapters: and so is every parson and vicar. *Co. Lit.* 43. Corporations sole.

When a corporation is erected, a name must be given it; and by that name alone it must sue, and be sued, and do all legal acts; though a very minute variation therein is not very material. 10 Rep.

33. A corporation aggregate must always appear by attorney; for it cannot appear in person, being invisible, and existing only in intendment and consideration of law. 10 Rep. 32. It can neither maintain or be made defendant to an action of battery, or such like personal injuries; for a corporation can neither beat nor be beaten, in its body politic.

Brooke Abr. 63. Neither can it be committed to prison, for its existence being ideal, no man can apprehend or arrest it. *Plow.* 538. And therefore also it cannot be outlawed; 10 Co. 32. b. for outlawry always supposes a precedent right of arresting, which has been defeated by the parties absconding, and that also a corporation cannot do: for which reasons the proceedings to compel a corporation to appear to any suit by attorney are always by distress on their lands and goods. *Bro. Abr.* 11. 72. A corporation must be sued by *original writ*; for it cannot be declared against as in the custody of the marshal. 6 Mod. 183.

The

Process.

The proper process against them is a *distringas*, for no attachment lies against a corporation. *Raym.* 152. nor a *capias*. *Bro.* 43. 152. And upon a *distringas* issuing, the court will compel the sheriff to return good issues. *Salk.* 191, pl. 2. Care must be taken in stating their name of incorporation,

How to proceed.

DRAW a *præcipe* for the original, take it to the curfitor, who will make out and seal it, then get a summons thereon from the sheriff of the county, directed to his officer, who may leave same with their town-clerk, who will undertake for their appearance: If not, I should apprehend leaving the summons with the mayor will be sufficient; and if no appearance entered in due time, issue out a *distringas*, and an *alias*, &c. same as against peers.

If they sue, it must be by attorney.

If they sue, they must sue in the name of the corporation, by an attorney appointed under the seal of the corporation; and the members cannot be witnesses for the corporation, 2 *Lev.* 232. 236. *Str.* 1069. but they may disfranchise one for that purpose. They may sue in common form by *latitat*, &c.

In ejectment the plaintiff declared on a demise made by a corporation, and did not set it forth by deed, or under the common seal, held good.

In ejectment in the common bench, the plaintiff declared upon a demise to him by the aldermen and burgesses of *Bury St. Edmund*, in the county of *Suffolk*, and did not set forth that it was by deed, or under seal of the corporation; upon not guilty pleaded, plaintiff had a verdict and judgment; and error was brought in *K. B.* and the error insisted on was, that this demise was void, because a corporation aggregate can do nothing but by deed under their common seal; and 2 *Cro.* 613. was cited as parallel. *Sed per Cur.* Since that case, the law is altered as to this point concerning declarations in ejectment, for now they are grounded on fictions only. Judgment affirmed. *Patrick against Ball.* *Carib.* 390. 12 *Mod.* 113.

A cor-

A corporation is not entitled to an *essoign*. *Ar- Eessoign.*
gent v. Dean and Chapter of St. Paul's. E. 23
Geo. 3. 2 Term Rep. 16.

Hundredors.

If an action be commenced on the statute of hue and cry, the plaintiff must take out his *original*; for the inhabitants of a hundred cannot be in custody of the marshal; nor are they liable to a *capias*. *Bro. 43.* The only method to proceed against them is by *summons* on the original, and *distress infinite*. *3 Keb. 126. 2 Saund. 375. 4 Mod. 296.* And the original usually recites the statute. *Ibid.* To be tested 40 days after the robbery, otherwise it is error. *2 Lev. 12.* And within a year after the robbery. *1 Brownl. 156.* If several are robbed, they cannot join. *2 Lev. 12.* The declaration must be against the hundred generally, and must shew the robbery to be *within the hundred*, and *upon the highway*; if not, it is good after verdict. *Carth. 71. 1 Mod. 221.*

By the 8 *Geo. 2. c. 16.* It is enacted, that no person shall maintain any action against any hundred, unless he shall, over and besides the notice required by the stat. 27 *Eliz. c. 13.* give notice thereof to one of the constables of the hundred, or to some constable, &c. of some town, &c. wherein such robbery shall happen, or shall leave notice in writing of such robbery at the dwelling-house of such constable, &c. describing in such notice, so far as the nature and circumstances of the case will admit, the felon or felons, and the time and place of the robbery; and also shall, within *twenty days* next after the robbery committed, cause public notice to be given in the *London Gazette*, describing as aforesaid, together with the goods and effects whereof he was robbed; and before any action commenced, go before the chief clerk, or secondary, or the filacer of the county wherein such robbery shall happen, or their deputies, or before the sheriff, and enter into a bond,

How to sue the hundred.

Declaration.

27 Stat. 13 Ed. 1. c. 1. 27 *Eliz. c. 13.* No person to sue the hundred in case of robbery without notice to a constable,

describing the case, and publishing in the *Gazette*.

And before action give security to, &c.

to the high constable, &c. of the hundred in which such robbery shall be committed, in one hundred pounds, with two sureties, &c. with condition for securing to such high constable, &c. (who are empowered to enter an appearance, and defend such action) the due payment of costs, after taxed, in case he shall be nonsuited, or discontinue, or in case judgment shall be given on demurrer, or a verdict given against him.

The sheriff to certify such bond. And certificate to be delivered to the chief clerk before process.

§ 2. "That when any such bond shall be entered into, the sheriff shall certify same to the chief clerk, &c. which certificate shall be delivered by the party robbed, to the chief clerk, &c. before any process shall issue for the commencement of such suit as aforesaid."

How to proceed.

PREPARE a *præcipe* for the original, take it to the curfitor of the county where the *venue* is laid, and a memorandum on a 2s. 6d. stamp, pay fine to the king, and for original: when sealed make a copy thereof, which formerly used to be served on some inhabitant of the hundred. But by 8 Geo. 2. c. 16:

High constable only to be served with the process, who is to give public notice thereof the next market day.

§. 4. it is to be served on the high constable, &c. of the hundred wherein the robbery shall happen; who is to cause public notice to be given in one of the principal market towns within such hundred, *on the next market day after he or they shall be served with such process*; or if there shall happen to be no market town within the hundred, then in some parish church within the same hundred, immediately after divine service, on the *Sunday* next after his being served, and enter an appearance, and defend for the inhabitants, as advised.

If he do not appear.

If he do not appear in time, a *distringas* may be sued, and levied against all or any of the defendants, and you may issue an *alias* and *pluries*, and sell the issues under the stat. 10 Geo. 3. as it is determined, that the statute extends to *all writs of distringas*. *Raban v. Plaistow*. 5 Barr. 2726.

How

How to appear.

THE defendant must enter appearance with Mr. Adams the filacer on the *quarto die post* of the return of the original. A memorandum on a 2s. 6d. stamp is necessary.

Hertfordshire, } The men inhabiting the hundred Declaration, the
to wit. } of O. in the said county were form of.
summoned to answer as well to our lord the now king, as to A. B. in a plea of trespass and contempt against the form of the statute of hue and cry in such case made and provided, &c. And whereupon the said A. B. who sues as well for our said lord the king as for himself by J. M. his attorney, complains that, &c. (here set forth the *præcipe*), to the great damage of the said A. B. and against the form of the statutes in such cases made and provided, whereby the said A. B. saith that he is injured, and hath damage to the value of 100*l.* and thereupon he brings suit, &c. And the said men inhabiting the hundred Plea.
of O. aforesaid, by J. K. their attorney, come and defend the force and injury, when, &c. and all contempt, and whatsoever, &c. and say, that they are in no wise guilty of the premises above laid to their charge, against the form of the said statutes, as the aforesaid A. B. who as well, &c. above complains against them, and of this they put themselves upon the country, &c.

The declaration need not recite the original at Declaration, large, R. M. 1654. Mills 26.; nor more of the statute than is pertinent to the action, 2 Vent. 215.; and must conclude *contra formam statuti*. Yelv. 116.

If the defendants plead, and there is an issue, the *Ven. fac. venire facias* shall be awarded to the next hundred. Thef. Brev. 144.; but see 29 Geo. 2. c. 18. s. 3. the *venire* shall be awarded *de corpore comitatús*, except the hundred against which the action is brought.

If judgment be given against the hundred, the sheriff, &c. on receipt of the execution against any sheriff to shew

the writ to two justices, who are to tax and levy the charges as by stat. 27 Eliz. c. 13.

any inhabitant, shall cause the same to be shewn gratis to two justices of the county, &c. (whereof one to be of the *quorum*), who are to cause such taxation and assessment to be made, and to be levied according to the 27th Eliz. (*viz.* by the constables, &c. rateably and proportionably, &c.), in which taxation and assessment there shall be provided and included, over and above what the costs and damages recovered by the plaintiff in such action shall amount to, all such expences, which the high constable hath been at, claim being made before the said justice, upon due notice for that

The money to be paid within ten days after collection to the sheriff, for the use of the plaintiff.

purpose given; and the money levied, to be paid over by such constable, &c. within ten days after collection, to the sheriff, to the use of the plaintiff, for his costs and damages, and to the use of the high constable, for so much as his expences in his defence shall amount to; of which he shall give an account, on oath, before any taxation; and shall have no further allowance than what shall be taxed, which the high constable shall cause to be taxed for that purpose. Stat. 8 Geo. 2. c. 16. s. 4.

The 7th section provides in what manner the constable shall be reimbursed his expences, in case the plaintiff is nonsuited, &c. and becomes, or his sureties in the bond become, insolvent.

Riotr.

If persons riotously assembled in part demolish and pull down a dwelling-house, and at the same time destroy goods and furniture in the house, although such goods and furniture were not destroyed by means of the pulling down of the house, the hundred is liable under stat. 1 Geo. 1. st. 2. c. 5. to yield damages for the destruction of the furniture as well as of the house.

Proceeding by Original.

No more costs allowed in process by original, than a common writ, unless the debt recovered be 50l.

IT is ordered, That from and after the last day of this present Michaelmas term, in all actions in which the plaintiff shall proceed against the defendant

ant by special original writ, and shall recover less than the sum of 50*l*. he shall not, on taxing costs, be allowed any more or other costs than he would be intitled to, in case he had proceeded by bill (except in such actions in which he could not proceed by bill, or in which any defendant shall be actually outlawed). *R. M. 23 Geo. 3.*

It is ordered, That original writs which by law ought to be signed by the filacers of this court, shall be signed by the said filacers before such writs be sealed by the officer of this court. *Hil. 31 Car. 2.* Writs by original to be signed before sealed, by the filacer.

It is ordered, That all writs and processes whatsoever issuing upon original writs before the appearance of the defendant, ought to be signed by the filacers of this court, according to the course of this court. *R. E. 31 Car. 2.* All writs by original ought to be signed before appearance, by the filacer.

How to proceed.

If you sue by original, the debt must amount to 10*l*. *5 Geo. 2. c. 27.* And in order thereto, prepare first a *præcipe*, which is to contain the whole count or declaration, in which must be set forth the defendant's estate, degree, or mystery, and the town, or hamlet, or place and county where he is, or was conversant.

Middlesex, (s.) If *A. B.* make you secure, &c. then put, &c. *J. D. late of Westminster in the said county, yeoman,* that he be before us on the morrow of *All Souls*, wheresoever, &c. to shew for that whereas (here set forth the whole count or declaration), and conclude thus: *To the said A. B. his damage of 69*l*. as is said, &c.* Præcipe for an original in case.

This is done on paper without a stamp, and taken to Mr. Adams the filacer, No. 1. Pump Court, Temple, who will make out the *capias* thereon, to the sheriff of the county where defendant is to be met with. But mostly, for expedition sake, it is done by the attorney; pay him 5*s*. 4*d*. for the first count, and 1*s*. for every other; sealing 7*d*. if

K k

there

there be an affidavit of the debt; the defendant swears it there, or before a judge of the court, sheriff for his warrant 2s. 4d.

Capias thereon. There must be a memorandum or warrant on a 2s. 6d. stamp filed with the filacer.

George the third, &c. To the sheriff of *Middlesex*, greeting: We command you, that you take *J. D.* late of *Westminster* in your county, yeoman, if he be found in your bailiwick, and him safely keep, so that you have his body before us on the morrow of *All Souls*, wheresoever we shall then be in *England*, to answer *A. B.* in a plea, for that whereas, (to the end of the *præcipe*) to the said *A. B.* his damage of 69*l.* as it is said; and have there this writ. Witness *Lloyd* lord *Kenyon* at *Westminster*, the 13th day of *July*, in the 31st year of our reign.

K. L. attorney.

Adams.

Bail for 64*l.*

As to the *teste*.

There are many notes in the old books respecting the *teste* of the original and *capias*; and there can be no doubt but that they both may be returnable the same day (*unless you proceed to an outlawry*), and that the *teste* of the *capias* may be of the last day of the preceding term (though the cause of action accrued in the vacation), otherwise in a short vacation, an original could not be purchased; and every *capias*, *alias*, and *pluries*, must have fifteen days between the *teste* and return of each; and the morrow of the *Ascension* shall be a good return, notwithstanding there be not fifteen days between the fourth day of the said return, and the assign day of the morrow of the Holy Trinity. 16 *Car. 1. c. 6. s. 7.*

You pay on original writs where the damages exceed 40*l.* a fine to the king, in the following proportions:

	£.	s.	d.
Fines to the king.			
From 40 <i>l.</i> to 66 <i>l.</i> 13 <i>s.</i> 4 <i>d.</i> i. e. 100 marks	0	6	8
From 100 marks to 100 <i>l.</i>	-	-	0 10 0
From 100 <i>l.</i> to 200 marks	-	-	0 13 4
From 133 <i>l.</i> 6 <i>s.</i> 8 <i>d.</i> to 166 <i>l.</i> 13 <i>s.</i> 4 <i>d.</i>	0	16	8
From 166 <i>l.</i> 13 <i>s.</i> 4 <i>d.</i> to 200 <i>l.</i>	-	1	0 0
And for every 66 <i>l.</i> 13 <i>s.</i> 4 <i>d.</i> more	-	0	6 8
And for every 100 <i>l.</i> more	-	-	0 10 0
Every 100 <i>l.</i> pays 10 <i>s.</i> fine. R. H. 6 W. & M.			
			<i>Middlesex,</i>

Middlesex, (s.) Command *A. C. late of West-* *Præcipe for an*
minster, *in the said county, merchant,* that justly, &c. *original in debt.*
he render to *J. B. 100l. of lawful money of Great*
Britain, which he owes to, and unjustly detains from
him, as it is said, &c. and unless, &c.

George the third, &c. to the sheriff of *Middlesex,* *Capias thereon.*
greeting: We command you, that you take *A. C.*
late of Westminster in your county, merchant, if he
be found in your bailiwick, and him safely keep, so
that you have his body before us on the morrow of
All Souls, wheresoever we shall then be in *England,*
to answer *J. B.* in a plea, that he render to him
100l. of lawful money of Great Britain, which he
owes to, and unjustly detains from him, as is *The penalty of*
said; and have there this writ. Witness, &c. *the bond.*

Adams.

If it be at the suit of an executor or administrator,
leave out the words, "owes to," and say, "unjustly
"detains."

If defendant cannot be taken on the *capias,* plain- *Alias & pluries.*
tiff may sue out an *alias,* and after that a *pluries*;
only adding the words to the *alias,* "as formerly we
"have commanded you;" to the *pluries,* "as often-
"times we have commanded you."

If defendant cannot be found in the county
where your first writ issued, or where you intend
trying the cause, then sue out a *testatum capias* against
him into that county where he is to be met with,
directed to that sheriff, and after the words, "to the
"said *A. B. his damage of 100l. as is said,"* add
these, "And our sheriff of *Middlesex,* at a certain *Testatum.*
"day now past, returned to us, that the said *C.* was
"not found in his bailiwick, whereas it is testified in
"our same court before us, that the said *C.* lurks and
"wanders up and down in your county; and have
"there this writ. Witness, &c."

The *teste* of the *alias* is on the *quarto die post* of *Teste.*
the return of the *capias,* and the *teste* of the *pluries* is
on the *quarto die post* of the *alias.*

And *N. B.* the *testatum* may be had in the first *Testatum* in the
instance, without really suing out the *capias,* but *first instance.*

you must pay the filacer for it, who ought to make it out to warrant the *testatum*.

These writs are taken to the sheriff's office (if bailable) for warrants thereon, for which pay 2s. 4d. officer for arrest, 10s. 6d. in town, country 1l. 1s. 0d.

If they are not bailable, put the *English* notice for defendant to *appear*, as at the end of a *common writ*, except the words "*at Westminster*," which leave out, and add, "*wheresoever we shall then be in England*," in order to your defence in this action."

How to appear.

Appearance.

THE appearance is to be entered *eight* days after the *return* of the *capias*, and not the *quarto die post*, and filed with the filacer Mr. Adams, for which pay 2s. 6d. and a memorandum or warrant on a 2s. 6d. stamp is to be filed at the same time.

Præcipe for appearance.

Middlesex, (Is.) *Appearance for A. C. at the suit of J. B. to a capias returnable on the morrow of All Souls, wheresoever, &c.* J. B. attorney.

If the defendant be served with an *alias* or *pluries*, then he is to enter his appearance in *eight days* after the return of either; if not, the plaintiff may enter an appearance according to the statute, on an affidavit of the service; stating that the defendant was personally served on such a day with a true copy of a writ of special *capias* (or *alias* or *pluries* special *capias*, as the case may be), issued out of and under the seal of this honourable court, returnable on the morrow of *All Souls*, wheresoever the king should then be in *England*, under which copy was written an *English* notice to the defendant, of the intent of such service, pursuant to the statute in that case made and provided.

Affidavit of service.

How to appear if Special Bail required.

If special bail, when to be put in.

If the action requires special bail, and the defendant be arrested in *London* or *Middlesex*, the defendant

defendant must put in his bail before a judge within four days after the *quarto die post* of the return of the writ: if he is arrested in any other county, then within six days after the *quarto die post* of the return of the writ.

If either the fourth or sixth day fall on a Sunday, the defendant has all the Monday following to put in bail. *N. on R. M. 8 Ann. Reg. 1.*

Bail by original is to be put in, in the county where the *capias* issues, for which purpose apply to the filacer for a short copy of the *capias*, and sum sworn to, then make a note of the names of plaintiff and defendant, and also the names and additions of the bail, on a slip of paper thus: "*Middlesex, John Denn against Richard Fenn, the bail are Thomas Stoul, of, &c. mercer, and Richard Mann of the same place, carpenter.*"

J. B. attorney.

Sworn to 56l. 10s.

Take the bail with the filacer to a judge's chambers (in term time he attends there regular), who will take their recognizance in double the sum sworn to, and pay him 16s. 6d.

A memorandum or warrant is to be delivered on a 2s. 6d. stamp for defendant.

Give notice to the plaintiff's attorney the same as in common cases, only say, put in with the filacer, before the Honourable Mr. Justice Buller, at his chambers in Serjeant's Inn, Chancery Lane, London, and the names are, &c.

Notice of bail.

In country causes, the bail-piece is to be allowed by a judge of the court, before it is filed with the filacer. Mr. Adams is filacer for all the counties, with whom it is to be filed.

If plaintiff excepts, he does it in the filacer's book within twenty days, and delivers notice of such exception to the opposite attorney.

Exception.

If there is an exception, then give notice to justify as by bill, and the same days are allowed. On the day of justification get the filacer to go to Westminster with his book, counsel to move 10s. 6d. filacer 7s. 6d. court fees 9s. have affidavit of the service of notice ready, as by bill.

How to justify.

May rule the
sheriff.

The plaintiff may rule the sheriff to return his writ, and bring in the body in the same manner as by bill; but the rules must keep pace with the defendant's time.

May deliver de-
claration *de bene*
esse.

The plaintiff may deliver his declaration *de bene esse*, upon the *quarto die post* of the return of his writ, and defendant has the same time to plead as by bill, and file it with the clerk of the declarations, the same as by bill.

If the action be brought in case, then the declaration runs thus:

Declaration in
case.

Middlesex, (*vs.*) A. C. late of Westminster, in the county of Middlesex, merchant, was attached to answer *J. B.* in a plea of trespass on the case, and whereupon the said *J. B.* by G. G. his attorney, complains for that whereas (to the end of the *præcipe* as far as the damage) then say, "and there-fore he brings his suit, &c." No pledges are to be added.

Declaration in
debt.

Middlesex, (*vs.*) A. C. late of W. in the county of Middlesex, esquire, was summoned to answer *J. B.* of a plea, that he render to the said *J. B.* 100*l.* of lawful money of Great Britain, which he owes to and unjustly detains from him; and whereupon the said *J. B.* by A. B. his attorney, complains, that whereas, &c. (and so on through the declaration); wherefore the said *J. B.* saith that he is injured and hath sustained damage to the value of 100*l.*; and therefore he brings his suit, &c.

How ingrossed,
&c.

The declaration being drawn is to be copied on treble penny, and delivered or filed the same as by bill; and the charge is the same.

In what county
to lay the venue.

If a *capias* issue into one county, and the declaration is laid in another, the bail are discharged, though it is good against the principal, 3 *Lew.* 235. 245. otherwise by bill.

Must plead now
without oyer of
the original writ.

Defendant formerly was not bound to plead till he had oyer and copy of the original, if he demanded it, but now he cannot have oyer although he demand it, by *Rule Trin. 21 Geo. 3.* and if he demands it,

it, plaintiff may sign judgment without giving it, if no plea filed. *Ibid.* Vide title *Oyer*.

If the defendant pleads, he files it (if special) Plea. with the clerk of the papers; if general, he may either enter it in the book kept by the clerk of the judgments, or deliver it to the attorney, on a treble penny stamp paper.

The clerk of the papers also makes up the paper book by original, if there be a special plea filed.

But the attorney makes up the issue if the plea be general, or such a plea as need not be filed; in that case he begins with the declaration first (as there is no memorandum by original), then the plea, and the award of the venire must be thus: *Therefore it is Venire awarded, commanded to the sheriff, that he cause to come before our lord the king, from the day of the Holy Trinity, in three weeks, wheresoever he shall then be in England, twelve, &c. by whom, &c. and who neither, &c. because as well, &c.*

When attorney makes up the issue.

The clerk of the papers always makes up the paper book or issue as of the term the declaration is filed or delivered, and imparts over (if the plea is of a different term or the replication) to the term in which the issue is joined.

How clerk of the papers makes up the book.

If you have an imparlance to enter, the form by bill will answer (except on the return day); in this case you put a general day wheresoever, &c. instead of a day certain, as thus:

And now at this day, that is to say, on the morrow of the *Holy Trinity*, wheresoever, &c. until which day the said *A. C.* had leave to imparl hereto, and then to answer the same, &c. (the same as by bill).

Imparl.

In making up of the record, put two *placitas* the same as by bill, after the first *placita* is entered, begin with your declaration, and go to the end of the issue (then enter the 2d *placita* and the *jurata* thus):

How to make up a record.

Middlesex, (ss.) The jury between J. B. by his attorney, plaintiff, and A. C. late of Westminster in the said county, merchant, defendant of a plea of tres-

pass on the case, is respited before our lord the king, until in fifteen days of St. Martin, wheresoever he shall then be in England, unless, &c. the same as by bill.

How to pass
record.

The record is passed at the same place as by bill, the issue to be entered at the clerk of the judgments, *venire* and *distringas* are exactly the same (except the return), which must be of a general return day, "*wheresoever*," &c. and the defendant's addition must also be put in (so is the writ of *subpoena*); *venire* and *distringas* are sealed, only pay 7d. each; *subpoena* is signed by Messrs. Provozt and Webb, pay 1s. 8d. seal 7d. a *præcipe* is left for the office.

Judgment by
default.

If the defendant suffers judgment to go by default, sign it on a treble penny stamp paper, enter on the roll warrants of attorney for plaintiff and defendant, and no memorandum, but begin with the declaration, sign it at the clerk of the judgments, same as by bill, make out inquiry thus:

Writ of inquiry.

George the third, &c. To the sheriff of Middlesex, greeting: Whereas A. C. late of Westminster in your county, merchant, was attached to appear in our court before us, to answer J. B. of a plea, for that whereas (to the end of the declaration); and it was in such manner proceeded, &c. exactly the same as by bill, only make it returnable on a general return day, "*wheresoever*, &c." pay 7d.

The sheriff executes it; proceed to final judgment the same as by bill, by giving a rule for judgment at the clerk of the rules, pay 1s. 10d. the writ of execution is sealed, pay 7d. warrant 2s. 4d.—The rule for judgment may be given on the return day (if not on a Sunday), and it expires in four court days after, Sunday or a *dies non* excepted.

Nonpros for Want of Declaration by Original.

It has been already observed, that plaintiff must declare within two terms next after the return of the process;

process; if he does not, defendant may sign his *non-pros* without giving a rule to declare, if he appeared in the term the writ was returnable, any time before the effoign day of the third term, provided no declaration be delivered. For unless he take immediate advantage of the plaintiff's neglect, the plaintiff may still deliver a declaration, and that within twelve months. *Orley v. Lee. 2 Term Rep. 123.*

As yet of the term of the holy Trinity 31 Geo. 3.

Witness Lloyd lord Kenyon.

Middlesex, (fs.) J. B. puts in his place J. G. Nonpros for not his attorney, at the suit of *A. B.* in a plea of trespass on the case. *declaring.*

Middlesex, (fs.) J. B. late of, &c. merchant, according to the form of the statute in such case made and provided, was served with a writ of our lord the king, called a special capias ad respondendum, issued out of the court of our said lord the king, before the king himself, directed to the sheriff of Middlesex, returnable in fifteen days from the day of Easter, wheresoever our said lord the king should then be in England, to answer A. B. in a plea of trespass on the case upon promises, to the damage of the said A. B. of 40l. And the said A. B. at that day appeared by J. J. his attorney, according to the form of the statute in such case made and provided, &c. (the same as by bill).

To be signed on double 2s. 6d. stamp paper.

Of amending the Declaration and Original Writ.

If you should have occasion to amend the declaration, &c. apply by summons same as by bill, which the judge will order on the same terms. If error is afterwards brought, and the original is made out, petition the master of the rolls for that purpose.

Of amending declaration, &c. and the original after error.

Suppose the damages are not sufficient, then petition to amend as follows, naming the cause:

To the Right Honourable the Master of the Rolls.

The humble Petition of the Plaintiff A. B.

Humbly sheweth,

Petition to
amend an
original. To
be ingrossed on
a treble 6d.
stamp paper.

THAT in *Hilary* term, in the thirty-first year of the reign of his present majesty, your petitioner commenced an action at law in his majesty's court of *King's Bench*, by original writ, returnable in eight days of *St. Hilary*, wheresoever, &c. on a promissory note of hand for the sum of 25*l.* drawn by the defendant, payable to your petitioner or order, with interest, and which note bears date the 20th day of *December* 1788, and your petitioner hath laid his damage to 200*l.*

That the said defendant appeared in *Trinity* term last past; your petitioner hath signed an interlocutory judgment for want of returning the paper-book, and hath given notice of executing a writ of inquiry of damages for the third day of *November* instant.

That by the great delay made on the part of the defendant, your petitioner's debt, with interest, amounts to 296*l.* which exceeds the damages laid in the said original writ, and that in consequence thereof your petitioner hath not as yet executed his writ of inquiry.

" Your petitioner therefore most humbly prays
" your honour, that the curfitor may be directed to amend the original, by striking out
" the words 260*l.* and inserting in the stead
" thereof the words 300*l.*

And your petitioner shall ever pray, &c.

Take this to the secretary's office in the rolls, pay 5*s.* 6*d.*; when answered, take it to the curfitor with the original, he will alter and get it resealed, pay 4*s.* 6*d.* If there is a verdict, there will be no occasion for this, as the want of an original cannot be assigned for error. *Stat. 18 El. c. 14.*

Proceeding

Proceeding to Outlawry.

IF the defendant is out of the kingdom, or absconds from being taken, the plaintiff may proceed to an outlawry against him.

It formerly only lay for *treason* and *felony*, but now by the stat. of 19 Hen. 7. c. 9. "process of
"outlawry may be sued as well in actions upon the case,
"as in actions of trespass or debt," vide 25 Ed. 3.
c. 17. but it lies in no case but where a *capias* lies.
2 Roll's Ab. 76.

Outlawry, in civil actions, is considered as in the nature of civil process, to compel an appearance to the suit; or, if after judgment, to procure satisfaction. The forfeiture, though nominally to the king, yet in truth goes to the plaintiff towards payment of his demand. If the outlaw appears, he pays all the costs, puts in sufficient bail, and does every thing he can, to put the plaintiff in as good a condition as he would have been in originally; or, if after judgment, the outlaw pays the debt and costs, the court reverses the outlawry upon motion, without any writ of error. The form of the reversal always is, "For the errors assigned, and other
"errors appearing upon the record," although there is, in truth, no error at all. 4 Burr. 2549. *Rex v. Wilkes*.

Outlawry in
civil actions.

A man outlawed is, when, by judgment of law, a man by his own default is ousted of the law. *Co. Lit.* 112. b. 128. b. For every man at his age of twelve years ought to be sworn to the law in a tourn or leet, and by his outlawry he is *positus extra legem*. *Ibid.* 122. b. A woman who does not swear to the law by judgment of outlawry, is not said to be outlawed, but *waiviata*. *Ibid.* And therefore if a woman is said to be *utlagata*, it will be error. 2 Rol. 804. Where a *capias* does not lie in process, defendant cannot be outlawed before or after judgment; as upon a writ of privilege by an attorney,

attorney, or another. 1 *Leon.* 329. If defendant avoids arrest, though he appears publicly, he may be outlawed. *Barnes* 320. On total absconding, no endeavours to arrest are necessary. *Ibid.* 322. If the defendant does not appear upon the return of the original, a *capias* issues. *Off. Br.* 22. *Reg. Jud.* 1. b. If he does not appear, nor taken on the *capias*, an *alias*, and afterwards a *pluries capias* issues. *Ibid.* The *capias* ought to be conformable to the *original*, and the *alias* and *pluries* to the *capias*. And if the defendant is not taken, or does not appear upon the return of the *pluries*, an *exigi facias* issues, which is also to be conformable to the *original* and *capias*. 110

When proceeded
on.

This mode of proceeding is used as well where, in an action against two, the one is arrested, and the other cannot be found, for you cannot declare against them separately, therefore the other must be outlawed previous to declaration, 1 *Str.* 473. 1 *Wils.* 78: in order to take care that the bail of the one be not discharged; at the end of the second term of the return of the writ, get a rule to declare against him, serve it on his attorney, and continue so to do from term to term till the other comes into court, or is outlawed; you tell the clerk of the rules you are proceeding to outlawry, as the rule is out of the common form, pay 4s. 6d. 110

Declaration.

If you outlaw other defendants, the declaration will be intitled the term the *outlawry is complete*, and not of the term the *first writ is returnable*. 1 *Wils.* 78.

If a *latitat* be
against two and
afterwards you
proceed to out-
lawry.

If a *latitat* be sued against two, and one only be arrested and puts in bail, and you are obliged to sue the other to an outlawry, the *original* and *other writs* must be against both: but you cannot proceed to outlaw him that has put in bail; *Edwards v. Carter, et al.* 2 *Str.* 473. but declare that C. together with A. B. his late partner, *assumpserunt super se.* 110

How to proceed.

The first thing you prepare is an *affidavit* of the debt; (if you mean to hold him to bail) then make a *præcipe* for the original as before, and take great care that the debt accrued due before the teste of it, otherwise it will be bad; but if you do not hold him

him to bail, then make a *præcipe* only, carry it to the filacer, Mr. Adams, pay him for same, and the fine to the king as before; he will make out a *capias*, *alias*, and *pluries* thereon, and the *capias* ought to be tested on the *quarto die post* of the return of the original; the *alias* on the *quarto die post* of the return of the *capias*, as also the *pluries* on the *quarto die* of the *alias*; and they are to be sealed; then leave them with the sheriff of the county where the venue is laid for a return of *non est inventus*, pay 1s. each name; when the sheriff has made his return, take them to the filacer, who will make out an *exigent* (which is to be conformable to the original and *capias*) and proclamation; the first of which requires the sheriff to cause the defendant to be demanded or exacted, in five county courts successively, to render himself, and if he does, then to take him, as in a *capias*.

A memorandum or warrant to be filed for plaintiff on a 2s. 6d. stamp.

The second commands the sheriff of the county, wherein the defendant dwells, or last dwelt, to make three proclamations thereof in places the most notorious, and most likely to come to his knowledge, a month before the outlawry shall take place. 6 H. 8. c. 4. 31 Eliz. c. 3. This writ is to bear *teste*, and return the same as the writ of *exigent*, and to be sent to the sheriff where the defendant dwells, or was last resident, to execute. N. B. The filacer files the warrants of attorney.

If there are not county courts (or huffings if in London) sufficient between the *teste* and return of the *exigent*, you must have an *allocatur exigent*, allowing as many exactions of the defendant as there are between the *teste* and return, and demanding him again to appear; and upon the *allocatur*, if there are not five exactions returned, you must have another, which the filacer also makes out. Kitch. 264. But if any county-day be past between the last of the former county-days and the return, no *allocatur* shall issue, but you must have a new *exigent*, for the demand of the party must be at five county-courts successively held one after another, without any court intervening.

When to have an *allocatur*.

tervening. *Plow. Com.* 371. b. It is said the quickest way is to proceed in *London*, as the huffings are held oftener than the county-courts.

How to proceed upon the *capias utlagatum*.

If the defendant does not appear at the return of the *exigent* or *allocatur*, by putting in bail, or filing a common appearance (as the case requires), there shall be judgment *quod utlagat*. *Kitch.* 263. ; then sue out a *capias utlagatum*, "*which is to extend the goods and chattels, lands and tenements, of defendant, and to take his body also :*" if he be taken, he gives bail as hereafter ; if goods, &c. be taken, get the sheriff to take an inquisition thereon (but no notice is requisite to be given), produce witnesses before the sheriff to prove deeds, or any other thing taken, that they are the defendant's, and an appraiser who has made appraisement thereof, to prove the value.

Transcript.

As soon as the *capias utlagatum* is returnable, get it from the sheriff, take a copy for yourself, carry it to the filacer, and he will make a transcript thereof, which take and file with your clerk in court, in the *Exchequer* office, *King's-bench-walks*. Upon receipt of it, he will make out a *venditioni exponas*, directed to the sheriff, to sell the goods and chattels appraised, and found upon the inquisition.

How to proceed after sheriff's return.

If the plaintiff gets a friend to take them at the appraised value, pay the money to the sheriff, who will make a bill of sale of same ; or if leases are taken in possession he will assign same, and return the *venditioni exponas*, which is filed with your clerk in court. The sheriff expects, in these cases, an *extra fee*, and he is to be paid his poundage thereon.

Petition, &c.

If the debt be above 50*l.* and not otherwise, then prepare petition to the lords of the Treasury, "*praying that the money levied, and in the hands of the sheriff, may be paid to the plaintiff, towards satisfaction of his debt and costs ;*" a certificate of the transcript must be certified by the clerk in court under the petition, which leave at their office ; (a fee *extra* is requisite to their clerk for expedition) ;
their

their answer is, "a reference to Mr. Chamberlaine, "their solicitor," of Lincoln's-inn, who will, on request, order you to appear before him, to make out the plaintiff's demand; he will require an affidavit of the plaintiff, sworn before a judge, together with an affidavit of his having paid his solicitor the costs, as by the bill of costs annexed. N. B. If the action be upon notes, bills, or other securities, he will require them to be produced before him, and, upon his report, what there is due for the debt, and perhaps he may report the costs (for it is discretionary, they being given by the lords); then file the same with the clerk of the Treasury, and get him to procure the king's sign manual, for the attorney general to consent to your motion, "that the money may be paid over to the plaintiff;" after the king's sign manual is obtained, give brief to counsel, with half a guinea, to move the court of Exchequer, "that the money returned upon the *venditioni exponas* by the sheriff of *Middlesex*, be paid to the plaintiff;" also give brief to the attorney general to consent, pay him 2*l.* 2*s.* clerk 2*s.* 6*d.* and on such motion and consent, the court will order it to be paid accordingly.

But if the sum levied exceed not the sum of 50*l.* If 50*l.* only, then there need no application to the Treasury; for the court of Exchequer, upon reading the return of the *venditioni exponas*, will, upon motion of your counsel only, order it to be paid. If 50*l.* only, then no need for the king's sign manual.

The clerk in court will then draw up the order, and seal a *subpoena* at the same time for the sheriff to pay the money to plaintiff forthwith, which plaintiff may demand at the sheriff's office, and if not paid, may move for an attachment against him. Clerk in court draws up order, and makes out a *subpoena*; if the money is not paid, move court for an attachment.

George the third, &c. To the sheriff of *Middlesex*, greeting: We command you, that you cause C. D. late of *Westminster*, in your county, merchant, to be demanded from [if in *London*, say, hustling to hustling], county-court to county-court, until, according to the law and custom of our kingdom of *England*,
6

land; he be outlawed, if he does not appear; and if he does appear, then take him and safely keep him, so that you have his body before us, on wherefoever we shall then be in *England*, to answer to *A. B.* of a plea, for that whereas (here insert the whole *præcipe*), to the said *A.* his damage of 600*l.* as it is said, and whereupon you did in last past (*the return of the pluries*) make return to us, that the said *C. D.* was not found in your bailiwick; and have you there this writ. Witness, &c. Adams.

To be signed by the filacer, pay him according to length, and seal 7*d.*

Proclamation,

George the third, &c. To the sheriff of *Middlesex*, greeting: Whereas, by our writ, we lately commanded you, that you cause *C. D. late of Westminster, in your county, merchant*, to be demanded from^a county-court to county-court, until, according to the law and custom of our kingdom of *England*, he be outlawed, if he should not appear; and if he should appear, then that you should take him and keep him safe, so that you might have him before us on wherefoever we should then be in *England*, to answer to *A. B.* in a certain plea of trespass on the case, to the damage of the said *A.* of 600*l.* as is said: We command you, that according to the statute made in the 31*st* year of the reign of *Elizabeth*, late queen of *England*, you cause the said *C. D.* to be proclaimed three several days, according to the form of the said statute, one of which proclamations to be made at or near the most usual church door of the parish where the said *C. D.* is an inhabitant, that he render himself to you, so that you have his body before us at the aforesaid time, to answer the said *A. B.* of the plea aforesaid, and have there this writ. Witness, &c. Adams.

^a Husting to husting, if in London.

To be also signed by the filacer, pay him 7*s.* sealing 7*d.*

What he forfeits.

A man outlawed in a personal action, forfeits his goods and chattels, 1 *Salk.* 305. and his chattels real, as a term for years, 2 *Roll.* 806. l. 43. If

If tenant at will sows his lands, the king shall have the emblements. *Ibid.* The king shall have all the profits of his freehold lands. 2 *Rel.* 807. But in a personal action it shall be for the benefit of the party. *Caf. in Parl.* 73.

In personal actions he does not forfeit any lands of which he has estate of freehold, 2 *Rel.* 807. nor a real charge for life. *Hut.* 54. Copyhold not liable to be seized. *Parker* 190.

George the third, &c. To the sheriff of *Middlesex*, greeting: We command you, that you omit not by reason of any liberty in your bailiwick, but that, by the oath of good and lawful men of your county, you diligently inquire what goods and chattels, lands and tenements, *C. D. late of Westminster in your county, merchant*, hath or had in your bailiwick the day of

Special *capias* *utlagatum.*

last day of the month of *May*, 1763. The day he was outlawed. past, or at any time afterwards, on which day he was outlawed in your county, at the suit of *A. B.* in a certain plea of trespass on the case, to the said *A. B.* his damage of 600*l.* as you have returned to us some time since, and by their oath cause the same to be extended and appraised, according to the true values thereof; and what you find by that inquiry take into your hands, and keep safe, so that you answer to us the values and issues thereof; and having so extended and appraised the same, what you shall have done herein, make known to us on

wheresoever we shall then be in *England*, distinctly and plainly under your seal, and the seals of those by whose oath you shall have made the extent and appraisement; and for that the said *C. D.* conceals himself, and runs up and down from place to place in your county, in contempt of us, and in prejudice of our crown, as we are informed: We command you, that you take the said *C. D.* wheresoever he be going in your county, as well within a liberty as without, and keep him safely, so that you have him before us at the aforesaid time, to do and receive what our said court before us shall

L 1

in

in this case determine; and have you there this writ. Witnesses, &c. Adams.

To be signed by Mr. Adams, and sealed; pay signing 4s. seal 7d. warrant to the sheriff 2s. 4d.

What debts are liable to be seized upon the *capias utlagatum*, and how the king is to recover them; he can only take the profits of the land.

When the outlawry is returned on the *exigi facias*, by the sheriff, and recorded in court, execution may be taken out against the party outlawed, either general to arrest the body, and extend the goods and lands, and also debts and *choses in action* belonging to the party outlawed; *Lut.* 330. and when such inquisition is returned by the sheriff, a transcript of the outlawry and inquisition is returned into the *Exchequer*, and thereupon if any debt be returned due from any one to the outlawed, on application to the *Exchequer*, a *sci. fa.* issues to such person to shew cause, why the king should not have such sum found due on the inquisition to the outlawed; and therefore the transcript of this record is sent into the *Exchequer*, that the court of ordinary revenue may have it in charge; but the court of *Exchequer* usually grants a *custodiam* to such person as sued the outlawry. *Hard.* 422. *Carth.* 441. *Yelv.* 19. 2 *Vern.* 314.

If the defendant be taken upon the *capias utlagatum*, the plaintiff cannot declare against him; for the process is determined. *Cro. Eliz.* 706.

To the Right Honourable the Lords Commissioners of his Majesty's Treasury.

The humble petition of A. B.

Sheweth,

Petition to the lords,

That C. D. late of merchant, being justly indebted unto your petitioner, in the sum of upon a promissory note of hand, bearing date the 22d day of June 1788, and also in 20l. for goods sold and delivered to the said C. D. your petitioner was obliged to outlaw him for the recovery thereof.

That

That a writ of *special capias ut'agatum* having issued against him, out of his majesty's court of *King's Bench*, at *Westminster*, at the suit of your petitioner, an inquisition was taken thereon by the sheriff of *Middlesex*, whereby certain goods and chattels to the value of 80*l.* mentioned in the said inquisition, were by the said sheriff seized, and taken into his majesty's hands; which writ and inquisition being transcribed into his majesty's court of *Exchequer*, at *Westminster*, a writ of *venditioni exponas* duly issued out of the said court, whereon the said sheriff hath returned, that he has, by virtue thereof, sold the goods and chattels in the said writ mentioned, for the sum of *l.* being the dearest price he could get for the same; which monies he had before the barons of the king's *Exchequer* at *Westminster*, at the day in the said writ mentioned, ready to be paid to his majesty's use.

That as your petitioner has been at great expence in the said proceedings, and as his majesty is not concerned in interest, but his name only made use of by your petitioner for the recovery of his said debt:

" Your petitioner therefore humbly prays your
 " lordships, that his majesty's attorney
 " general may be authorised to consent on
 " behalf of his majesty, that the sum of
 " *l.* may be paid to your petitioner
 " towards satisfaction of his said debt
 " and costs.

" And your petitioner shall ever pray, &c."

" These are to certify, that in term. Certificate of
 " in the twenty-ninth year of the reign of the clerk in
 " his present majesty king *George* the third, a court.
 " transcript of an outlawry was returned and
 " filed in this court against *C. D.* late of, &c.
 " merchant, outlawed in *Middlesex*, at the suit of
 " *A. B.* in a plea of trespass on the case, by
 " which transcript it does appear, that several
 " goods and chattels of the said *C. D.* were seized
 " into

“ into his majesty’s hands by Esq.
 “ and Esq. then sheriff of the
 “ said county of *Middlesex*, by virtue of a *special*
 “ *capias utlagatum*, in the said transcript specified;
 “ And I further certify, that a writ of *venditioni*
 “ *exponas* has issued, for selling the said goods
 “ and chattels so seized, whereon the said sheriff
 “ hath returned, that he hath sold the same for the
 “ sum of l.”

A. B. plaintiff,

and

C. D. defendant.

In the King’s Bench.

Affidavit:

A. B. of, &c. maketh oath and faith, That the above named C. D. is justly and truly indebted unto this deponent, in the sum of according to the annexed account, and also in the further sum of 23*l.* for costs paid to Mr. G. C. this deponent’s solicitor, in prosecuting the outlawry in this cause against the said C. D.

The order for payment of the money, and the *subpœna*, are made out by the clerk in court.

Upon appearance by attorney to the *capias utlagatum*, outlawry may be reversed, except where special bail is required, then bond to be given to the sheriff.

By the 4th & 5th of *W. & M. c. 18. s. 3, 4.* a defendant taken upon a *capias utlagatum* shall be discharged on his attorney’s signing an appearance (except where bail is required); but if bail is required, then the sheriff is to take bond with one or more surety, in *double the sum for which bail is required*, and *no more*, for appearance, by attorney, at the return, and do and perform such things as shall be required by the court.

Persons taken as before shall be discharged, giving security after the return of the writ.

If any person be not able within the return of such writ to give security (where special bail is required) that whensoever the prisoner shall find security for appearance, to the sheriff, by attorney, at some return of the term then next following, to reverse the said outlawry, and to do and perform such other thing and things as shall be required, such sheriff shall discharge him. *Ibid.*

Special bail.

If the case originally required special bail, and defendant stands out to an outlawry, he cannot come

come in and appear to the outlawry, without putting in special bail, and the filacer shall not issue a *superfedeas* till then. 3 Burr. 1920. *Campbell v. Daley*.

If the *capias utlagatum* recites a special original specially expressing the cause of action, the sheriff must take bail, though the *capias utlagatum* is not marked for bail, 3 Burr. 1482. for process of outlawry is not within 12 Geo. 1. c. 29. nor can defendant reverse the outlawry, without giving such bail as the law requires. *Ibid. Cracraft v. Gleddowne*.

If the party defendant appears before he is returned outlawed, he does it upon the exigent (and if no bail is required in that case), he enters the appearance with the filacer, Mr. Adams, the same as upon a *special capias*, who thereupon makes out a *superfedeas* to the sheriff, to stay all further proceedings, he signs it; pay 3s. 10d. and for seal 7d.

If it is bailable, then bail must be put in and perfected, by giving notice *two days* before, *exclusive*, to the plaintiff's attorney of the names and places of abode of the bail, and the time of justifying; bespeak the book of the filacer, to go to *Westminster* for that purpose, who enters and takes the bail in the usual manner (though you may put in bail first at a judge's chambers, and give notice of justifying after); motion by counsel for that purpose 10s. 6d. filacer if put in at *Westminster*, 1l. *aliter* at chambers 16s. 6d. and for the justification 7s. 6d. court fees 9s. rule for the allowance of the bail 4s. As soon as bail is complete draw up the rule for the allowance, and the filacer makes out the *superfedeas*, which deliver to the sheriff, who returns the *allowance* upon the *exigent* in this manner:

"I have altogether ceased from executing this writ, Return, having received his majesty's writ of *superfedeas* for that purpose." The answer of, &c.

Pay the sheriff for the allowance 2s. 4d.

The filacer, if he goes to *Westminster*, charges 3s. 6d. for his attendance extra to put in bail, or justify.

How to put in bail, to reverse upon the *capias utlagatum*, and no arrest.

If it be upon *mesne* process (and no bail required), then upon entering a common appearance, leaving with him a memorandum or warrant on a 2s. 6d. stamp, with the filacer, and getting his certificate thereon, a judge at his chambers will grant an order to reverse the outlawry. *Vide* p. 520.

Where bail is required, after it is put in, may move to reverse the outlawry.

But if special bail is required (upon perfecting *same*), you may move the court to reverse the outlawry directly after justification; but if done after, it must be moved, "on an affidavit made of perfecting the bail," and must be on payment of costs taxed.

How avoided.

If the person outlawed, at the time of the outlawry pronounced, was within the age of discretion, as if he was an infant under fifteen years, it may be avoided. 2 *Roll.* 805. *Dy.* 239. So if a woman at the time she is waived, was covert baron. 2 *Roll.* 806. So if a man at the time of his outlawry, was in prison, it will be error. *Lit. f.* 437. 2 *Roll.* 803. But if by covin or consent, it will not avoid. *Co. Lit.* 259. *b.* If a man at the time of his outlawry was out of the realm, it will be error. *Skin.* 6. So in the king's service with a captain in war. 2 *Roll.* 803. So if ~~on~~ on his private business out of the realm. *Ibid.* 804. But not if he goes with intent to avoid process. *Ibid.* l. 30. And it may be avoided either by plea or writ of error. *Co. Lit.* 259. *b.* If for matter appearing on record, the party may reverse it by plea, *Co. Lit.* 529. *b.* or for omission of any process, *ibid.* or variance, *ibid.* But it is discretionary on motion: but generally where the outlawry is avoidable for matter of fact, if not in felony, &c. it must be avoided by writ of error. *Ibid.*

The attorney general will not grant his *fiat* for the writ of error till defendant is in actual custody on the *cap. utlag.* 4 *Burr.* 2527. Outlawing a man beyond sea is error, not irregularity. *Barnes* 319.

If goods be taken, after reversal, defendant shall be restored to them.

If the goods of the person outlawed be taken by the sheriff, and after the outlawry is reversed by writ of error, the defendant shall be restored to the goods

goods again, because the sheriff was not compellable to sell these goods, but only to keep them to the use of the king. 5 Co. 90. 1 Roll. Abr. 778. Cro. Eliz. 278. 2 Jon. 101. 5 Mod. 61.

He shall have all his lands and tenements though the king has granted them to another and his heirs. 1 And. 188. Cro. Eliz. 278. 2 Vern. 312. And he may enter upon the reversal without petition or *scire facias*. *Ibid*.

It is said, if the defendant ever lets the proceedings get into the Exchequer, although he reverses the outlawry upon bail, yet they cannot make restitution; for that the court of *King's Bench* cannot send a writ to the treasurer, and the court of Exchequer have no record before them to issue out a warrant for restitution. 5 Mod. 61. It is said in the same book, that as soon as the writs are delivered to the officers of the Exchequer, viz. the treasurer, the property is altered, and the officers become debtors to the parties. 2 H. 7. *Ibid*.

The defendant cannot be taken on a Sunday upon a *capias utlagatum*. Stat. 29 Car. 2. c. 7. though the court will not attach the sheriff, but leave the defendant to his remedy given by the statute. Barnes 319.

Since the 4 & 5 W. & M. a writ of error to reverse the outlawry in civil cases, is seldom heard of; but in case error be brought through or by want of proclamation, "bail must be put in before the allowance, not only to appear and answer the plaintiff in the former suit, in a new action to be commenced by him for the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall begin the suit before the end of two terms after allowance of the writ of error, or otherwise avoiding of the said outlawry." Stat. 31 Eliz. c. 3. s. 3.

The bail are answerable in this case for the condemnation money. Lee C. J. 1 Wilf. Serocole v. Hanson. 4 Salk. 469.

L1 4

Pending

No bail in error
of an outlawry
till reversal.

Pending error to reverse an outlawry on mesne process, the defendant moved to quash the writ, because no bail was given. *Cur.* That is never done till the outlawry is reversed; and then we take bail to appear to an original to be brought within two terms, which was done. *Str.* 951. *Ducket v. Martin.*

Where special
bail is required
on reversal of
outlawry, al-
though no affi-
davit be made
previous.

The defendant was outlawed without affidavit of debt, and brought error, and assigned his being beyond sea at the time of the outlawry, which court reversed; but the question was, on what terms, whether on special or common bail. The court, on considering 4 & 5 *W. & M.* declared they had a discretionary power to require bail or not, and the want of an affidavit of the debt before was no objection, because that is only to warrant an arrest; and here was one in time for the new action that must be brought. And though 31 *Eliz.* is the only act that expressly requires bail; it is not to be inferred from thence, that in other cases it ought not to be insisted on; for that act makes a new error, and the bail upon it is *absolutely to pay the condemnation.* *Serocold v. Hampson.* *Str.* 1178. *Salk.* 496. 1 *Wilf.* 3.

I was led into a great error by the filacer's clerk, Mr. *Ackland*, who informed me that upon the *capias utlogatum*, he took the recognizance in the usual way to render. But this case came before the court and it was held, it should be bail upon the 31 *Eliz.* to pay the *condemnation money*; the filacer had taken the recognizance to render, the bail did render; and on motion to discharge the defendant out of custody, the point was fully discussed and settled. *Borwick v. Parking.* *E. T.* 31 *Geo.* 3. *S.* Point settled. *Phillips v. Warburton and another.* *M. T.* 1785.

How to obtain
the writ.

The curfitor makes out the writ of error, and it is allowed by the court on motion. If the plaintiff does not appear and confess the errors, the defendant must sue out a *sci. fa. ad audiendum errores*, and upon two *nibils* returned, the court will reverse the outlawry of course; but if he does come in, and does

does not confess the errors assigned, but joins in error, the defendant must make up the error-books, and go to argument and judgment as in other cases of error.

If a person procures another to be outlawed clandestinely, who appears in public, the court will oblige such person to reverse the same at his own costs, 12 Mod. 413. but if it appears that the party outlawed had lurked backward and forward between two counties, and that the person had dealt openly, and been regular in sending proclamation to the sheriff where he sometimes resided, the court will not interpose in a summary manner, but leave the party to his ordinary remedy by plea or writ of error. 2 Vent. 46. T. Jon. 211. Comb. 19.

The plaintiff cannot be nonprossed after the outlawry reversed, for that writ is become void. Praet. Reg. 271.

Of declaring after Outlawry.

A NEW original must be sued out, the former being at an end after outlawry pronounced, for defendant undertakes to put in bail to a new original to be sued out within two terms. Stat. 31 E. c. 3. f. 3.

The declaration has no need to be laid in the same county in which the former original was made. 3 Lev. 245.

By the 21 Jac. 2. c. 16. f. 4. it is enacted, That if in any action brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry; that then the plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time, within a year after such judgment of outlawry reversed, and not after.

Upon superseding the exigent, if plaintiff delivers a declaration, there should be a notice to plead, and a rule given before judgment can be signed; and defendant has in such case the same time to plead as in other cases.

Outlawry

Outlawry after Judgment.

PROCESS of outlawry lies on a *special original* only, and not where the proceedings are by bill. If you have judgment by *original* against a man that lurks in several counties, in regard you cannot regularly have execution against him in more counties than one at a time, the best way is to sue him to outlawry after judgment, for then you may take out as many writs of *capias utlagatum* against him as you please, and this for a small charge; besides, it saves the charge of reviving the judgment by *scire facias* after the year and day, and you may have an *exigent* immediately after the return of the *ca. sa.* without an *alias* and *pluries*, and also without a writ of proclamation. *Cro. Jac.* 677.

The method.

First, sue out a *ca. sa.* for the debt and costs, as the case is, into the same county where the action was laid, and get *non est inventus* returned by the sheriff; then carry same to Mr. Adams, who will make out an *exigent* thereupon, which deliver to the undersheriff, to be returned as other *exigents* are.

The *exigent* being returned, the filacer will make out a *capias utlagatum* into as many several counties as you will, either in *England* or *Wales*, *general* or *special*; and if the defendant be taken, he cannot be discharged without reversing the same for sufficient error, or making satisfaction.

Infants.

BY the common law, a *male* or *female* is called an infant till the age of twenty-one years. *Co. Lit.* 171. *b.*; but by the civil law the age of seventeen years. *Ibid.*

In what cases he is liable, and what not.

An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physick, and such

such other necessities, and likewise for his good teaching and instruction, whereby he may profit himself afterwards; but if he bind himself in an obligation or other writing, with a penalty for the payment of any of these, that obligation shall not bind him. *Co. Litt.* 172. a. And if he brings the materials to the taylor, there is no need to aver that they were suitable to his quality. *Lat.* 157. Necessaries for an infant's wife, are necessities for him, but not if provided in order for the marriage, *Str.* 168.; and upon such contract by an infant, an *assumpsit* lies. *Lat.* 197. *Jon.* 146. *Pal.* 528. Or, if he gives a single bill for money upon such contract, it binds him. *1 Rol.* 729. l. 20. *Cro. Eliz.* 920. *1 Lev.* 86. The court will judge what things are necessary. *Cro. Eliz.* 583. If goods not necessary are delivered to an infant, who after full age promises to pay, he is bound. *Str.* 690. An infant shall be charged for a trespass done by him. *Com. Dig.* 3 V. 170. So an infant of seventeen years of age shall be charged for malicious words. *Noy* 129.

If a warrant of attorney be given by an infant and another, and judgment is entered up thereon, the court, on motion, will order the name of the infant to be struck out of the warrant of attorney, and set aside the judgment as against him. *2 Black. Rep.* 1133. *Vide Str.* 1043.

An infant is to prosecute a suit by his guardian or best friend, though the term used is *prochein amy*, which is next friend; but he cannot defend by such next friend, but must defend only by guardian, because the law supposes, that where he demands or sues for any thing, it is for his benefit. And the power for infants to sue by *prochein amy*, was first introduced by the *stat. West.* 2.

If an infant be joined with others, in suing in the right of another, the action may be brought by attorney; for they all make but one person in law. *3 Cro.* 377.

If warrant of attorney be given by infant, and judgment thereon.

How to prosecute and defend.

If joined by others in suing in right of another, may be brought by attorney.

But

Infant defendant, in all cases must defend by guardian.

But in all cases where an infant is defendant, though it be in another's right, and though joined with others, he must defend by guardian. *2 Cro.* 289. *1 Lev.* 294.

If he appears by attorney, it is error.

In all actions real, personal, or mixed, against an infant, if he appears by attorney, it is error. *8 Co.* 58. *b.* *9 Co.* 30. *b.*

If attorney undertakes to appear, he must do it by guardian.

If an attorney undertakes to appear for an infant, and enters it *per attornatum*, it may be amended and made *per guardianum*. *Str.* 114. 445.

How plaintiff is to apply.

Plaintiff's attorney should apply to defendant to name a guardian; and if he does not in six days, you may apply to the court to oblige him to do it. *2 Wils.* 50.

Before declaration a guardian must be appointed.

The writ may be served at the suit of the infant, but before declaration, a guardian must be appointed by the court, which is done either by taking the guardian and infant before a judge at his chambers, or by petition; if by petition, it is thus:
In the King's Bench.

A. B. the younger, plaintiff,

Between and

C. D. defendant.

To the right honourable Lloyd lord Kenyon, lord chief justice of England.

Petition to assign a guardian.

The humble petition of A. B. the younger, an infant, under the age of twenty-one years, the plaintiff in this cause,

Sheweth,

N. B. To be inserted on a treble 6d.

That your petitioner has, as he is advised, good cause of action against the above named *C. D.* for assaulting and beating your petitioner, and that your petitioner has commenced an action against the said *C. D.* for the same; but in regard that your petitioner is an infant under the age of 21 years,

Your petitioner, therefore, most humbly prays your *lordship*, to assign unto him *G. F.* of, *&c. merchant*, your petitioner's father, as and for your petitioner's guardian, to prosecute the said action against the said *C. D.*

And your petitioner shall ever pray, &c.

Under-

Underneath which petition write the following acceptance:

" I do hereby agree to accept to be the guardian
" to the above-named *A. B.* an infant, according to
" the prayer of the above petition. *G. F.*"

Witness, *J. G. attorney for the plaintiff.*

To which annex the following affidavit sworn before a judge.

A. B. the younger, plaintiff,
In the King's Bench. and

C. D. defendant

J. G. of, &c. gentleman, attorney for the plain- To be ingrossed
tiff in this case, maketh oath and faith, That *A. B.* on treble 6d.
the above named plaintiff, did on the day of paper.

duly sign the petition hereunto annexed, in the presence of this deponent; and this deponent further faith, that he was also present, and did see *G. F.* the person mentioned in the said petition, duly sign the acceptance or agreement thereunder written, in order to his being a guardian to the said *A. B. the younger.*

Take the petition and affidavit to the judge's chambers, who will thereupon make his order for plaintiff to prosecute by his guardian, pay 12s. take same to the clerk of the rules for a rule thereon, pay 5s. and when you declare, annex a copy of the rule to the declaration. How to proceed.

One admission will do, to prosecute and defend all actions that may be in suit. One admission will do.

London, (ss.) *A. B.* by *G. F.* who is admitted by the court of our lord the king, before the king himself here, to prosecute for the said *A. B.* who is within the age of twenty-one years, as the next friend of the said *A. B.* complains of (as in other cases). The form of the declaration.

In the issue, say in the memorandum (" comes issue.
" *A. B. who is admitted by the court of our lord the*
" king, before the king himself here to prosecute,") as before.

In the venire and distringas, say, "*A. B. by his* Venire and distringas.
" next friend, plaintiff."

An

Infants defend-
ing.

If he appear and
plead by at-
torney.

An infant cannot defend without a guardian if he is sued, nor can he plead (till a guardian is admitted by some judge of the court). *St. Pr. Reg. 265.*

But if he appear and plead by an attorney, and the plaintiff finds it out, he may in vacation time apply to a judge for a summons (or in term to the court), for a rule to shew cause "*why common bail filed should not be struck out, and the plea be set aside, and that the defendant may be obliged to appear by a guardian;*" and if no one is named within six days, the plaintiff may name one for him, which will be ordered of course. *Vide Str. 1076.*

In the K. B.

A. B. against C. D.

To the right honourable Lloyd lord Kenyon, lord chief justice of his majesty's court of King's Bench.

The humble petition of C. D. the above defendant, an infant under the age of twenty-one years.

Sheweth,

Petition to assign
a guardian to
defend.

That the above plaintiff hath lately commenced an action at law against your petitioner for (here set forth the cause of action), and your petitioner is advised and believes that he has a good defence to make thereto; but in regard your petitioner is an infant,

Your petitioner humbly prays your Lordship would be pleased to assign *G. H.* of, &c. as his guardian, to defend this suit.

"And your petitioner shall ever pray." C. D.

I do accept and agree to be the guardian of the said C. D. an infant, according to the prayer of the above petition.

G. H.

"Witness J. G."

Affidavit of the signing by the infant, and the acceptance of the guardian, is requisite in this case.

In case the guardian appear before the judge's clerk, there is no necessity for an affidavit of his acceptance; pay 12s. rule 5s.

The infant must file common bail by his guardian at the suit of the plaintiff; if a memorandum or warrant should be filed on a 2s. 6d. stamp with the common bail, or before plea pleaded.

Annex

Annex the copy of the rule to the plea, or serve a copy on plaintiff's attorney: plea to be filed.

And the said *C. D.* by *G. H.* who is admitted by the court of our lord the king here, to defend for the said *C. D.* who is under the age of twenty-one years, comes and defends the wrong and injury, when, &c. says, that he the said *C.* at the time of the making the said several promises and undertakings in the said declaration mentioned, was under the age of twenty-one years, to wit, of the age of nineteen years, and no more, to wit, at London aforesaid, &c. and this he is ready to verify; wherefore he prays judgment if the said *A.* ought to have or maintain his aforesaid action thereof against him, &c.

Plea of infancy per guardian.

J. G.

If defendant does not appear by guardian in the time allowed by the rules of the court, the plaintiff must procure an affidavit of the service of the process, and that the defendant is an infant, and that he hath not appeared; upon which the judge, without taking out a summons, will make an order, "That unless the infant appears within so many days after personal service of the order, plaintiff may assign John Doe for guardian, and enter appearance for defendant;" and upon affidavit of the service of this order, the judge will make the order absolute, and then an admission is drawn up and filed as aforesaid. *Vide Str.* 1076.

If infant does not appear by guardian, how plaintiff is to proceed.

It is clear that the infant plaintiff, who sues by *prochein amy*, is not liable to costs, because he cannot, while under age, disavow the suit; but the *prochein amy* is liable, *Str.* 548. *James v. Hatfield, Barnes* 128. and if it appears to the court that he is not of sufficient ability to pay the costs, the court will order another who is. But an infant defendant (although he names a guardian) is liable to costs, if the verdict be against him. *Dy.* 104. 1 *Bulstr.* 109. *Str.* 708.

Infant plaintiff not liable to costs, but *prochein amy*, &c.

Infant defendant is liable, altho' he names a guardian.

The costs must be demanded of plaintiff's next friend, and on refusal, you may move for an attachment on an affidavit of the facts.

If

Costs to be demanded.

Confirmation of a promise. If the plaintiff reply to a plea of infancy, that the defendant after he had attained twenty-one confirmed the promise, and the defendant rejoin that he did not, the plaintiff need only prove a promise, and the defendant must shew that he was under age at the time. *Term Rep. 1 V. 648. Borthwick v. Carruthers.*

Statute of Limitations.

The statute never begins to run against a plaintiff who is a foreigner, until he comes into this realm.

If the plaintiff is a foreigner, and doth not come to *England* in fifty years, he has still, six years after his coming into *England*, to bring his action; and if he never comes to *England* himself, he has always a right of action while he lives abroad, and so have his executors or administrators after his death. *Strithorst v. Græme. 3 Wils. 145.*

A bill of Middlesex or latitat may be sued.

A bill of *Middlesex* or *latitat*, in the first instance, may be sued out in order to save the statute of limitations, which being done, take same to the sheriff for a return of *non est inventus*, then enter the same on a roll, as of *the term in which the writ is returnable*, thus,

As yet of the term of St. Michael, 32d Geo. the 3d. 1791. Witness Lloyd lord Kenyon.

Entry of a bill of Middlesex.

Middlesex, } The sheriff is commanded to take to wit. } *C. D.* and *John Doe*, if they may be found in his bailiwick, and them safely keep, so that he may have their bodies before the lord the king, at *Westminster*, on *Monday* next after the morrow of *All Souls*, to answer *A. B.* in a plea of trespass, and that he then have there this precept. By bill.

Stormont and Way.

Appearance of the plaintiff, and sheriff's return thereon.

At which day before our lord the king, at *Westminster*, came the said *A. B.* in his proper person, and offered himself against the said *C. D.* in the plea aforesaid, and the sheriff, to wit, Esq. and Esq. sheriff of the said county, returned that the said *C. D.* was not found in his bailiwick.

Take

Take the roll and writ to the clerk of the judgments, who will enter the same, and mark the writ, pay 2s. carry in the roll, and file the writ in the treasury.

Middlesex, (js.) Entry of a bill of *Middlesex* Docket, between *A. B.* plaintiff, and *C. D.* defendant, returnable on, &c. Roll. 56.

This entry will serve for the *latitat*, enter it verbatim, *George* the third, &c. to the end, to *Stormont* and *Way*; it will also serve for an attachment of privilege.

By taking out the bill of *Middlesex, &c.* in this manner before the end of the six years, there is no necessity of doing it again, nor is there any occasion to declare thereon pursuant to the rules of court at the end of two terms. 2 *Vent.* 192. For when you come to arrest defendant, and he pleads the statute, it may be continued till the suing out of the new process, which must be shewn in the replication; averring at the end thereof, *that the first process sued out and returned, was sued out with a view to exhibit his bill, or declare for the same identical cause of action; and that the same was sued out within the time limited by the statute.*

No necessity to do it again if once taken out.
For it may be continued when you sue again.
Averment in the replication.

Entry of Satisfaction.

SATISFACTION being obtained of any judgment an entry on the record ought regularly to be made to discharge the same, or the judgment apparently continues in force against the party convicted thereon. And for this purpose, the party making satisfaction may demand of the other a warrant or authority from him, directed to some attorney of the court wherein the judgment is recovered, authorising such attorney to enter up satisfaction; the warrant may be had ready printed at the stationers, which is done in the following manner: Write your satisfaction piece on a slip of unstamped parchment, in the form of a bail-piece, thus:

M m

Michael-

Satisfaction
piece.

*Michaelmas Term in the 32d year of the reign
of king George III. Stormont and Way*

Middlesex, (ss.) Satisfaction is acknowledged
between *A. B.* plaintiff, and *C. D.* defendant,
in a plea of debt (or as the case is) for 1000*l.*
debt, and 6*3s.* damages.

J. G. attorney.

Judgment entered of
Easter Term, 31 Geo. 3.
Roll 860.

Take this and the warrant of attorney executed to
the clerk of the judgments, pay him *3s.* for the en-
try, if in term; in vacation *5s. 10d.* more for the
keys of the treasury, and *3s. 4d.* attendance.

Ejectment.

AN *ejectment* is an ingenious fiction, for the trial of
titles to the possession of land. In form it is a
trick between two, to dispossess a third by a sham suit
and judgment. The artifice would be criminal, un-
less the court converted it into a fair trial with the
proper party. The control the court have over the
judgment against the casual ejector, enables them to
put any terms upon the plaintiff, which are just.
When the tenant in possession asked to be admitted
defendant, the court was enabled to add conditions;
and therefore obliged him to allow the fiction, and go
to trial upon the real merits. *2 Burr. 1294. Fair-
claim v. Shamtitle.*

The nature of
the action.

This action is an invention by the court (though
fictitious) for the advancement of justice, and to
force the parties to go to trial upon the merits, with-
out being entangled in the nicety of pleading on
either side. *2 Burr. 668.*

The

The plaintiff and defendant are, in the first instance, merely nominal, *where there is a tenant in possession*; and the lessor of the plaintiff and the tenant in possession, are substantially and in truth the parties to the suit. *Ibid.*

The great advantage of this fictitious mode is, that being under the control of the court, it may be so modelled as to answer in the best manner every end of justice and convenience.

Public utility has adopted it in lieu of almost all real actions; which were embarrassed and entangled with a thousand niceties. But as there was good and bad in the method of real actions, the good ought to be grafted into ejectments, in such manner as to avoid the bad. 3 Burr. 1296. *Fairclaim v. Shamtitle.*

An ejectment is a possessory remedy, and only competent where the lessor of the plaintiff may enter: ^{A possessory action.} therefore it is always necessary for the plaintiff to shew that his lessor had a right to enter; by proving a possession within 20 years, or accounting for the want of it under some exceptions allowed by the statute. Twenty years adverse possession, is a positive title to the defendant; it is not a bar to the action, or remedy of the plaintiff only, but takes away his right of possession. 1 Burr. 119. *Taylor v. Atkins.* Every plaintiff must shew a right of possession, as well as of property, and therefore the defendant needs not plead the statute, as in the case of actions. *Ibid.*

The confession of lease, entry, and ouster is sufficient to bar a nonsuit for want of proof of actual ^{Lease, entry, and ouster.} entry. The meaning of it is, to bring the matter to the mere question of the plaintiff's possessory title. But to avoid a fine, there must be an actual entry, and the demise cannot be carried beyond the actual entry. In all other cases it is sufficient. *Gates v. Wigfall.* 3 Burr. 1897.

The formal title of a trustee shall not in an ejectment be set up against the cestuy que trust; because from the nature of the two rights, the cestuy que trust is to have the possession. *Armstrong v. Piers.* 3 Burr. 1901.

If the lessor make out his title to the premises, he shall have judgment to recover his term stated in the declaration and damages which are nominal, and shall in consequence have a writ of possession, which the sheriff is to execute by delivering him the peaceable possession thereof.

The real damages are afterwards recovered in an action of trespass for the mesne profits which the tenant has wrongfully received, and which will hereafter be fully treated on.

There is no distinction between a judgment in ejectment upon a *verdict*, and a judgment by default. In the first case, the right of the plaintiff is tried and determined against the defendant; in the last case, it is confessed. 2 Burr. 668.

The plaintiff must recover according to the title. If she demands a half, and she appears to have a *third only*, she shall recover for such third. If she demands 40 acres, she may recover 20. *Denn v. Purvis*. 1 Burr. 329.

Where an ejectment is brought there can be no *disseisin*; because the plaintiff may lay his demise when his title accrued, and recover the profits from the *time* of the demise. The entry confessed is previous to the making the lease; but there is no *real* or supposed *re-entry*, after the ejectment complained of. If it was considered as a *disseisin*, no *mesne profits* could be recovered without an *actual re-entry*. *Taylor v. Horde*. 1 Burr. 111.

A judgment in ejectment is the recovery of the *possession* (not of the *seisin* or *freehold*) without prejudice to the *right*, as it may afterwards appear between the parties. He who enters under it in truth and substance, can only be *possessed according to right*, *prout lex postulat*. *Ibid*. 114.

If lessor has a freehold, he is in as a freeholder; if he has a chattel interest he is in as a termor; and in respect of the freehold, his possession enures *according to right*. If he has no title, he is in as a trespasser; and, without any re-entry by the true owner, is liable to account for the profits. *Ibid*.

How to proceed if no Tenant in Possession.

If there be no actual tenant or occupier of the lands (except in the case of landlord and tenant, where the landlord has right of re-entry as upon a lease, where half a year's rent is left unpaid), the mode of proceeding will be by sealing a lease on the premises; and it is first necessary that the claimant do take possession of the lands, by making a formal entry thereon, to empower him to constitute a lessee for years; and being in possession of the soil, he, there on the land, seals and delivers a lease for years to such lessee, and having thus given him entry, leaves him in possession of the premises. This lessee is to stay upon the land, till the prior tenant, or he who had the previous possession, enters thereon afresh, and ousts him, or till some other person (either by accident or agreement beforehand) comes upon the land, and turns him out or ejects him. For this injury the lessee is entitled to his action of ejectment against the tenant, or the casual ejector, whichever it was that ousted him, to recover back his term and damages.

How to proceed, if no tenant in possession (except under the 4 Geo. 2).

How to deliver the lease.

Supposing *A.* to be the person claiming title to the premises, he may, if he pleases, sign the following letter of attorney to empower *D.* to execute a lease in his name, of the premises in question, to *E. F.* which is done upon the premises, *D.* and *E. F.* being only thereon; then *D.* after having executed the lease to *E. F.* leaves him in possession of the premises, who is turned out by *G. H.* to whom, whilst on the premises, *E.* delivers a declaration in ejectment.

Explanation.

Know all men by these presents, that I *A. B.* of, &c. gentleman, have made, ordained, constituted, and appointed, and by these presents do make, ordain, constitute, and appoint *C. D.* of, &c. hofier, to be my true and lawful attorney, for me, and in my name to enter into and take possession of a certain messuage late in the tenure or occupation of *G. F.*

The form of the letter of attorney, if requisite.

and *J. H.* situate and being in the parish of, &c. in the county of *Oxford*, but now untenanted, and after the said *C. D.* hath taken possession thereof, for me, and in my name, and as my act and deed, to sign, seal, and execute a lease of the said premises, with the appurtenances, unto *E. F.* of the parish of, &c. maltster, to hold the same unto the said *E. F.* his executors, administrators, and assigns, from the day of last past, before the date hereof, for the term of five years, at the yearly rent of a pepper-corn (if lawfully demanded), subject to a proviso, to make void the same on payment by me of the sum of six-pence to the said *E. F.* In witness, &c.

Sealed and delivered, &c.

The lease.

This indenture made, &c. between A. B. of, &c. gentleman, of the one part, and E. F. of, &c. of the other part, witnesseth, That the said A. B. for and in consideration of the sum of 5s. of lawful money of Great Britain, to him in hand paid by the said E. F. at and before the sealing and delivery of these presents, the receipt whereof the said A. B. doth hereby acknowledge, hath demised, granted, and to farm let, and by these presents doth demise, grant, and to farm let, unto the said E. F. his executors and administrators, all that messuage, &c. situate and being in the parish of in the county of Oxford, late in the possession of G. F. but now untenanted, to have and to hold the said messuage and premises hereby demised, with the appurtenances, from the day of last past, before the date hereof, for and during, and unto the full end and term of five years from thence next ensuing, and fully to be complete and ended, yielding and paying therefore yearly and every year during the said term, unto the said A. B. or his assigns, the rent of one pepper-corn, if lawfully demanded, at the feast of

Provided always, and upon this condition, that if the said A. B. shall at any time or times hereafter tender

tender or cause to be tendered to the said *E. F.* his executors or administrators, the sum of 6*d.* that then this present indenture shall be void, and of none effect (any thing herein contained to the contrary in any wise notwithstanding). In witness whereof the parties hereto have interchangeably set their hands and seals the day and year first above written.

Sealed and delivered as the act and deed of the above named *A. B.* by *C. D.* of in the county of hofier, by virtue of a letter of attorney to him for that purpose made by the said *A. B.* bearing date the day of instant, being first duly stamped in the presence of

If no Letter of Attorney be made.

If there be no letter of attorney made, then the owner of the land must go upon it, before the *effoign-day of the term*, and there seal and deliver a lease to a friend of his as tenant, and at the same time deliver him possession of the premises. This being done, get another person (a friend) to go upon the premises, and turn out the tenant, by thrusting him off the premises, and afterwards let such ejector remain on the premises, and whilst he continues there, serve him with a declaration in ejectment, in which make the *tenant* the *plaintiff*, the *landlord* the *lessor*, and the *actual ejector* the *defendant*, and declare on the demise in the lease, and write a notice at the foot of the declaration, to appear and plead as hereafter.

The declaration is the same as others, only instead of *John Doe* and *Richard Roe*, the plaintiff and defendant are, in this case, the *real persons*; as for instance, *E. F.* the lessee of the premises, will be *plaintiff*, and *G. H.* the *defendant*; *A. B.* will be the lessor of the plaintiff; and instead of the common notice at the end, put this: Declaration.

M m 4

Take

Notice to appear. Take notice, that unless you appear in his Majesty's court of King's Bench at *Westminster*, next *Trinity term*, at the suit of the above-named plaintiff, *E. F.* and plead to this declaration in ejectment, judgment will be thereon entered against you by default. Your's, &c. *G. H.*

If in town say,
"first day of."

After service, make the following affidavit of executing the letter of attorney, of *sealing the lease*, and the *ouster* by the defendant.

E. F. on the demise of *A. B.* plaintiff.
In the *King's Bench*. and
G. H. defendant.

Affidavit.

J. K. of, &c. *gentleman*, maketh oath, and saith, That on the day of last, he did see *C. D.* in the letter of attorney hereto annexed, for and in the name of *A. B.* the lessor of the plaintiff, enter upon and take possession of the messuage in the lease hereto also annexed mentioned, by entering on the threshold of the outer door thereof, and putting his finger into the key-hole of the door of the said messuage, the same being locked up and uninhabited, so that no other entry thereon could be made, or any possession thereof taken without force. And this deponent further saith, That he did, on the same day, see the above named *C. D.* after such entry made, and whilst he stood on the threshold of the said door, duly sign, seal, and deliver the lease hereunto annexed, in the name of the said *A. B.* and as his act and deed deliver the same unto the said *E. F.* the plaintiff above named; and that after the said lease was so executed, this deponent did see the said *E. F.* take possession thereof by virtue of the said lease, by entering upon the threshold of the said outer door of the said messuage, and putting his finger into the key-hole thereof (the same being then locked and uninhabited), and no other entry to be made therein (save as aforesaid), and that immediately afterwards the said *G. H.* the defendant came and removed the said *E. F.* from the said door, and put his foot on the threshold thereof; whereupon this deponent did, on the day and year aforesaid, deliver

deliver to the said defendant *G. H.* who still continued upon the threshold of the said messuage, a true copy of the declaration of ejectment, and notice thereunder written hereto annexed.

After this is sworn, indorse it, "*to move for* Moving for judgment against the casual ejector," and unless the judgment. defendant appears and enters into the common rule, sign judgment, as on a common ejectment, counsel *10s. 6d.* to move, rule for judgment *5s.*

Any person claiming title to the premises, and Any person may who are usually admitted by the court, may with appear. leave appear, and enter into the common rule, upon motion made for that purpose.

Leaving beer in an alehouse cellar, is keeping What is keeping a possession. possession; and if judgment is signed on a lease sealed, it shall be set aside. *Str. 1064.* But it appeared that the plaintiff's attorney knew where the lessee removed, and might have served him. And in the case of renting ground, to which there is no house or barn, if it is known where the tenant lives, he must be served. *Ibid.*

Of Notice to quit previous to Ejectment.

Where the tenant holds the premises of the lessor of the plaintiff, it is sometimes necessary to give him notice to quit possession, in order to maintain an ejectment. Here we may observe, that demises, where *no certain term* is mentioned, are held to be tenancies from *year to year*, which neither party can determine, without reasonable notice to the other. This notice is, in most counties, *six months* preceding after that part of the year when the tenancy commenced; and therefore it hath been holden, that half a year's notice to quit possession must be given to such tenant, before the end of which time the landlord cannot maintain an ejectment (unless the tenant has attorned to some other person, or done some act disclaiming to hold as tenant, in which case no notice is necessary). And the same law will apply to the executor of such a tenant.

When notice to quit requisite, and when not.

When no notice
is requisite.

I desire you to
quit, &c. or
shall insist upon
double rent,
good notice.

When double
rent.

Custom of
London.

3 *Wils.* 25. But after the expiration of a lease for a certain term, the tenant continuing in possession is deemed a trespassor; and therefore an ejectment, which is an action of trespass, may be brought without any notice to quit. *Vide Proceedings by a Mortgagee.*

On a motion for a new trial in ejectment, the case turned on the sufficiency of the notice to quit, which was as follows: *I desire you to quit the possession, at Lady-day next, of, &c. or I shall insist upon double rent for the same.* Verdict for plaintiff. It was contended on the part of the defendant, that the notice was conditional, and that it was therefore optional in the defendant either to quit, or keep possession on the payment of double rent. Lord Mansfield said, it clearly means to refer to the statute, although the penalty given by the statute is not double rent, but double the yearly value, which is more favourable to landlords; for double rent would be no penalty on the expiration of some leases. The additional words only prove the landlord's anxiety to get into possession. It is an emphatical way of enforcing the notice, and shewing the tenant that he is in earnest, by informing him of the legal consequence, if he held over. *Doe v. Jackson and others.* Dougl. Rep. 167.

If a landlord give notice to his tenant to quit at the expiration of the lease, and the tenant hold over, he is entitled to double rent. *Messenger v. Armstrong.* 1 Term Rep. 53.

By the custom of London, if the premises are above the yearly rent of 40s. half a year's notice must be given to quit; if under 40s. a quarter's notice. 2 Sid. 20.

Defendant held from Michaelmas, and he was served with notice to quit at Midsummer; but when he received this notice, he made no objection that it required him to quit at that period of the year, but merely said, "*I pay rent enough already, and it is hard to use me thus.*" Verdict for plaintiff. Motion to set it aside: Court were of opinion that the defendant had not waived the objection, and made rule absolute to enter a nonsuit, as the verdict was taken with liberty to move to set it aside, and enter a nonsuit.

suit. Oakapple dem. Green v. Copous. 4 Term Rep. 361.

In the case of a tenancy from year to year as long Administrator, as both parties pleased, if the tenant die intestate, his administrator has the same interest in the land which his intestate had : and the lessee of such an administrator may declare on an ejectment on a term for seven years. *Doe on dem. Shore v. Porter. 3 Term Rep. 13. Buller 106.*

Lessor seised in fee of the premises in question. On 11th May 1781, defendant took the house from that time, under a parol demise at 10*l.* per annum, the rent to commence at *Midsummer* following. The defendant *Darby* let part to defendant *Brislow*: 26th March 1785, the defendant *Darby* was served with notice to quit on the 29th September following. Ejectment brought, and verdict for the plaintiff subject to the opinion of the court.—Question, whether the rule, which requires that half a year's notice should be given to a tenant at will before ejectment can be brought, requires also, that such notice should expire at the end of the year. Lord Mansfield—When a lease is determinable on a certain event, or at a particular period, no notice to quit is necessary; because both parties are equally apprized of the determination of the term. If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year: but then it is necessary, for the sake of convenience, that if either party should be inclined to change his mind, he should give the other half a year's notice before the expiration of the next or any following year. As to the case of lodgings, that depends on a particular contract, and is an exception to the general rule. The agreement may be for a month or less time, and there much shorter notice would be sufficient, where the tenant has held over the time agreed upon, than in the other case. Mr. J. Buller—There should

should have been half a year's notice to quit before the end of the term. *Right v. Darby*, 1 *Term Rep.* 160. Judg. for defend. *Vide* 2 *Salk.* 413. 13 *H.* 8. 15. *b.*

Infant to give notice.

Where an infant becomes entitled to the reversion of an estate leased from year to year, he cannot eject the tenant without giving the same notice as the original lessor must have given. 2 *Term Rep.* 159. *Maddox v. White and others.*

For what an Ejectment lies.

For what it lies.

Ejectment lies for a manor, messuage, so many acres of land, meadow, pasture, wood, &c. 11 *Co.* 55. So *de una domo*, 2 *Cro.* 654. *de cotagio*, *Cro. Eliz.* 818. *de coquinâ*, *Noy* 109. *de stabulo*, 1 *Lev.* 58. *de romea*, 3 *Leo.* 210. of the part of a house, if it appear what part, *Str.* 695. of part, as *locum vocatum* a passage room, and ascertained in what part, *Lord Raym.* 1470. of a close of pasture called five acres, containing five acres, *ibid.* c) tithes, and *portione decimarum*, *Hard.* 57. of pasture for one hundred sheep, *Dal.* 95. For common of pasture generally, if joined with lands, will be good after verdict, *Str.* 54. Of a cole mine. 2 *Cro.* 150. It lies by the owner of the soil for land, part of the highway. 1 *Burr.* 133. Land is a sufficient description, though part of a house is built by encroachment upon it, for plaintiff claims the land not the nuisance. *Ibid.* For a messuage, garden, and tenement. *Str.* 834. For one messuage or tenement. 3 *Wils.* 23. 3 *Mod.* 328. 1 *Sid.* 295. Of a kitchen, *Noy* 109. a bedchamber or lodging room, by the name of one room in such a house, in the middle story of the said house, 3 *Lev.* 210. of an apple lost or storehouse, *Cro. Eliz.* 854. *Cro. Car.* 614. 1 *Lev.* 58. By the owner of the soil, for land which is part of the king's highway, or of an acre of land, described only by the name of land, though there was a wall and porch, and part of a house, built upon it. *Goodtitle v. Alker*, 1 *Burr.* 133. But it

For what it does not lie.

it does not lie without shewing the quantity and quality of the land, and how many acres of land, meadow and pasture, &c. 11 Co. 55. 1 Salk. 254. 4 Mod. 97. and *derivulo*, or *aquæ cursu*; for it must be so many acres of land. *Aqua coopert. Yelv. 143.* For a messuage and tenement. 1 Term Rep. 11. It lies for a prebendal stall after collation to it. 1 Wils. 14. and for a mine. Cro. Jac. 150.

How to proceed if Tenant be in Possession.

Where there is a tenant in possession, no *actual* lease is made, entry or ouster by the defendant, but all are merely *ideal*, for the sole purpose of trying the title; therefore, in order to proceed against him, prepare a declaration, ingross it on a treble penny stamp paper, the copy of which, "*upon stamp*," you serve the tenant with; if there be more than one tenant, each must be served with a copy, but if the man is not at home, his wife will do (provided she be served on the premises, and so sworn to); this is necessary both in town and country causes. At the time of service, in all cases it is requisite to *read over or explain the notice at the foot of the declaration to the person served.*

The tenant's son, daughter, or servant, he being out of the way, must not be served, unless it appear to the court, that such declaration and notice came to his hands, in which case it has been held a good delivery; but if the tenant *purposely* keep out of the way to avoid being served, the court on affidavit will grant a rule to shew cause why that should not be deemed good service.

In case the servant, &c. be served, and motion be made that it be deemed good service, the tenant must swear that the declaration never came to his hands before the time of shewing cause, or the court will make the rule absolute. *Doe v. Roe. Trin. 30 Geo. 3.* In this case, to ground such a motion you must shew endeavors to serve him at several times, &c.

When

When to be served, and of the Notice.

When to be served.

It is to be served before the *assign-day* of every term, either in town or country, and the notice must be made to appear in the *next term* after delivery; but the delivery on a *Sunday*, or on the *assign-day* of that term wherein the defendant is to appear, will not do.

If a country ejectment, and notice to appear in Michaelmas or Easter term.

If a country ejectment is served on the tenant to appear in *Michaelmas* or *Easter* term, the plaintiff must make his motion for judgment in *that term* he has made the *notice of his appearance*, or he can have no rule for judgment, unless on special application to the court. *Salk. 257.* May now have a judge's order.

When to make the notice to appear in London.

If the premises be in *London* or *Middlesex*, the notice must be made to appear the *first day* of the *next term* after service; for if made *general'y*, the tenant in possession has the *whole term* to appear in; but if the tenements lie in any other county, the notice must be to appear *as of the next term generally*.

Country.

Declarations.

Declaration by bill.

Michaelmas Term, in the 32d year of the reign of king *George the third.* *Stormont and Way.*

Middlesex, to wit. *John Doe* complains of *Richard Roe*, being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself; *For that whereas, John Charles*, on the 2d day of *April*, in the 30th year of the reign of our lord the now king, at *Westminster* in the said county, had demised, granted, and to farm let to the said *John Doe*, two messuages, two barns, two stables, two orchards, fifty acres of arable land, fifty acres of meadow, fifty acres of pasture, twenty acres of wood, and twenty acres of furze and heath, with the appurtenances, situate, lying, and being, in the parish of *Saint Clement Danes*, in the county aforesaid, *To have and to hold* the said tenements, with

the appurtenances, to the said *John Doe* and his assigns, from the 1st day of *April* in the year aforesaid, for and during, and unto the full end and term of five years from thence next ensuing, and fully to be complete and ended; by virtue of which said demise the said *John Doe* entered into the said premises with the appurtenances, and was possessed thereof, until the said *Richard*, afterwards, to wit, on the said 2d day of *April*, in the 30th year aforesaid, with force and arms, &c. entered into the premises aforesaid, with the appurtenances, which the said *John Charles* demised to the said *John*, in manner aforesaid, for the term aforesaid, which is not yet expired, and ejected the said *John* out of his said farm, and other injuries to him then and there did, against the peace of our said lord the now king, to the damage of the said *John Doe* of 10*l.* and therefore he brings suit, &c.

A. B. attorney for plaintiff.

John Doe.

Pledges to prosecute

and

R. Roe.

Mr. Richard Roe,

I am informed that you are in possession of, or Notice: claim title to the premises in this declaration of ejectment mentioned, or to some part thereof; and I being sued in this action as a casual ejector, and having no claim or title to the same premises, do advise you to appear ^a the first day of next Hilary ^a If in the country, say term, in his majesty's court of King's Bench at West-^a next Hilary minster (if it be by bill), if by original, ("wherefo-^a term," and "ever he shall then be in England,") by some attor-^a leave out the ney of that court; and then and there by rule of "first day." of the same court, to cause yourself to be made defendant in my stead, otherwise I shall suffer judgment to be entered against me, and you will be turned out of possession.

Your loving friend,

Richard Roe.

The not subscribing the name of the casual ejector at the foot of the notice, is no ground of application to set aside the proceedings for irregularity.

Haz. e.

Hazlewood v. Thatcher. 3 Term Rep. 351. In C. P. it is. Barnes 172. and so determined very lately.

Michaelmas term, in the 32d year of the reign of king George III. Stormont and Way.

The like by

Original.

London, (s.) Richard Roe, late of London, yeoman, was attached to answer *John Doe* in a plea, wherefore with force and arms, &c. he entered into 5 messuages, and 1 acre of land, with the appurtenances, in the parish of St. Dunstan in the West, in the said city, which *John Sibthorpe* demised to the said *John Doe*, for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said *John Doe*, and against the peace of our sovereign lord the now king; and whereupon the said *John Doe*, by G. G. his attorney, complains, for that whereas the said *John Sibthorpe*, on the 2d day of April, in the 30th year of the reign of his said majesty, at the parish aforesaid, had demised to the said *John Doe* the said tenements, with the appurtenances, to have and to hold the said tenements, with the appurtenances, to the said *John Doe*, and his assigns, from the 1st day of April then last past, to the full end and term of five years, from thence next ensuing, and fully to be complete and ended, by virtue of which said demise the said *John Doe* entered into the said tenements with the appurtenances, and was possessed thereof; and the said *John Doe* being so possessed thereof, the said *Richard Roe* afterwards, to wit, on the said 2d day of April, in the 30th year aforesaid, with force and arms (that is to say), with swords, staves, and knives, entered into the said tenements, with the appurtenances, in the possession of the said *John Doe*, which the said *John Sibthorpe* demised to the said *John Doe*, in manner aforesaid, for the term aforesaid, which is not yet expired, and ejected the said *John Doe* out of his said farm, and other wrongs, &c. to the grievous damage, &c. and against the peace, &c. whereupon the said *John Doe* saith that he is injured, and hath damage to the value of 10*l.* and thereupon he brings suit, &c.

Mr.

Mr. T. G. I am informed that, &c. as in the Notice.
other notice by bill " *the first day of next Hilary*
" *term in his majesty's court of King's Bench, where-*
" *soever he shall then be in England.*"

The best way is to proceed by original; as you The best way is
prevent the defendant bringing a writ of error (un- to proceed by
less in parliament), and the declaration on a single original.
demise is printed and sold at the stationers in blanks
already stamped; but in case there should be wanted
one on a double demise, it will be as follows:

Staffordshire, (ss.) Richard Roe, late of Stafford, Declaration by
in the county aforesaid, yeoman, was attached to original on a
answer *John Doe* in a plea, wherefore with force and double demise.
arms he entered into one messuage, one orchard,
one garden, 70 acres of land, 70 acres of pasture,
and 70 acres of meadow, with the appurtenances,
in the parish of *F.* in the said county, which *J. G.*
demised to the said *John Doe*, for a term of years
which is not yet expired; *And also* wherefore with
force and arms he entered into one other messuage,
one other orchard, one other garden, &c. (as be-
fore) with the appurtenances, in the parish of *F.*
in the said county, which *T. P.* demised to the said
John Doe for a term which is not yet expired, and
ejected him from his said several farms, and other
wrongs to him then and there did, to the great da-
mage of the said *John Doe*, and against the peace
of our lord the now king; and whereupon the said
John Doe, by *J. K.* his attorney, complains, *that*
whereas the said *J. G.* on the 13th day of *February*,
in the year of our Lord 1788, at the parish of *F.*
aforesaid, in the county aforesaid, had demised to
the said *John Doe* the said tenements first above
mentioned, with the appurtenances, *to have and to*
hold the said tenements first above mentioned, with
the appurtenances, to the said *John Doe* and his
assigns, from the 12th day of *February* in the year
last aforesaid, to the full end and term of seven
years from thence next ensuing, and fully to be
complete and ended. *And also whereas* the said *T. P.* Second count,
on the 13th day of *February*, in the year of our

N n

Lord

Lord 1788, at the parish of *F.* aforesaid, in the said county, had demised to the said *John Doe* the tenements aforesaid, secondly above mentioned, with the appurtenances, *to have and to hold* the said tenements secondly above mentioned to be demised, with the appurtenances, to the said *John Doe* and his assigns, from the 12th day of *February*, in the year last above mentioned, to the full end and term of 7 years from thence next ensuing, and fully to be complete and ended : By virtue of which said several demises the said *John Doe* entered into the said several tenements, with the appurtenances, so demised to him as aforesaid, and was possessed thereof, and being so possessed thereof, he the said *Richard Roe*, afterwards, to wit, on the said 13th day of *February*, in the year last above mentioned, with force and arms, &c. entered into the said several tenements, with the appurtenances, in and upon the possession of the said *John Doe*, his said several terms therein not being yet expired, and ejected the said *John Doe* out of his said several farms, and other wrongs, &c. to the great damage, &c. and against the peace, &c. whereupon the said *John Doe* says he is injured, and hath sustained damage to the value of 10*l.* and therefore he brings his suit, &c. Add the notice at the end as before, *to appear generally as of the term*, leaving the words "*the first day of*" out.

How to describe the Premises if a Rectory, &c.

Rectory.

If it be of a rectory, say, He entered into the rectory of the parish church of *O.* in the county of *C.* ; and also into two messuages, ten barns, ten out-houses, ten gardens, ten orchards, fifty acres of arable land, fifty acres of meadow land, fifty acres of pasture land, and fifty acres of other land, with the appurtenances, situate and being in the said parish of *O.* in the county of *C.* aforesaid ; and also into all and singular the tithes of corn, grain, hay, wood, grass, wool, lambs, and calves, arising, growing,

growing, renewing, increafing, and happening, within the faid parifh of *O.* and within the bounds, limits, and titheable places of the faid rectory.

If of a vicarage; He entered into three meffuages, ^{Vicarage;} three barns, three ftables, three orchards, three gardens, 200 acres of land, 200 acres of pafture land, 200 acres of meadow land, and 200 acres of arable land, with the appurtenances, fituate and being in the parifh of *I.* in the faid county; and alfo into all the tithes of corn, grain, hay, grafs, wool, lambs, potatoes, parfnips, turnips, and carrots, growing, renewing, and happening within the limits and titheable places of the vicarage or parifh-church of *I.* in the faid county.

In an ejectment for a rectory or vicarage, you must fhew a demife to be made by deed, though no lease is actually made, as thus: *For that whereas* the faid *John Beech*, on the 2d day of *February*, in the year of our Lord 1788, at the parifh of *C.* in the county aforefaid, by his indenture fealed with his feal, and to the court of our lord the king now here fhewn, bearing date the day and year aforefaid, had demifed, &c.

For a rectory or vicarage, must fhew demife by deed.

If it be of a manor, the description of the premises is thus: “ Entered into the manor of *F.* in the faid county, with the rights, members, and appurtenances thereunto belonging, and into fifty meffuages, fifty cottages, fifty barns, fifty ftables, two mills, fifty gardens, fifty orchards, 3000 acres of pafture land, 3000 acres of meadow, 1000 acres of wood, 500 acres of marfh land, 500 acres of furze and heath, and common of pafture for all manner of cattle, with the appurtenances, in the parifh of *F.* in the faid county.”

Manor.

In this declaration the law requires, that the thing demanded be fo fpecified, that the fheriff may certainly know what to give the poffeffion of, if plaintiff fhould recover, for it would be in vain if execution could not be had of the thing fpecifically demanded. 2 *Ld. Raym.* 1470. 2 *Str.* 908. But fuch a very exact defcription is not equally neceffary

The thing demanded to be ftated with certainty.

in this action as in a *præcipe*: For in this action the plaintiff is to shew the sheriff the premises, and take possession at his peril of only what he has title to; if he takes more, the court will in a summary way set it right. 1 Burr. 629. *Coffingham v. King*.

In what County to be brought, and of the Demise.

In what county to be brought.

Day of the demise.

It must be brought in that county where the lands lie, and the declaration must set forth the particular parish; and the day of the demise must be laid after the title accrues, otherwise plaintiff will be nonsuited, and the plaintiff must lay the commencement of his supposed lease, to have been precedent to the ejectment by the defendant. 1 Sid. 8. 2 New Abr. 171.

If title accrue in Easter vacation, yet you may deliver declaration as of Easter term.

If the title of the lessor of plaintiff accrue in Easter vacation, yet the plaintiff may deliver his ejectment as of Easter term, and shall recover thereon, because he makes up his issue, or takes judgment as of the next term, otherwise the act of the law which supposes the bill filed as of the first day of Easter term, before a title accrued to plaintiff, would be an act of injury to him, and delay his right; for a man ejected out of a lease made in term time, could not complain till term was over. 2 Vent. 174. It must be brought within 20 years. 21 Jac. 1. c. 16. Sid. 432.

Twenty years.

Motion for Judgment.

THIS motion should be made the same term the notice to appear is, and an affidavit is to be made of the service on the tenant or his wife, and indorsed, to move for judgment against the casual ejector; fee to counsel for this motion is 10s. 6d. He may either move it in court, or sign his name to it: If the former, it is handed to the clerk of the rules, if the latter, you take it to his office. *Vide the new rule, respecting the drawing up the rule for judgment.*

Annex a warrant or memorandum on a 2s. 6d. stamp.

In

In a town cause you may move this the *first* day of Town cause, the term; but to have a plea, it must be moved before the 4 last days of the term; if not, the tenant will have until *two days before the assign day to appear and plead*.

If it be a country cause, and the declaration be to Country cause, appear of *Michaelmas* or *Easter term*, the motion must be made in *the term* the notice is to appear in, and the rule for judgment must be drawn up of *that term*, according to the new rule. The agent before he makes his motion, keeps a copy of the declaration by him, in order to make up the issue, if it be required.

John Doe on the demise of *J. P.* plaintiff,
In the King's Bench.

and

Richard Roe defendant.

A. B. of in the county of maketh Affidavit of the
oath and faith, that he this deponent did, on the service.
day of last, personally serve *J. B.*
tenant in possession of the premises in the declaration hereto annexed mentioned, with a true copy of the declaration and notice thereunder written, hereto annexed, and at the same time this deponent (*read to him the notice thereunder written*), or it may be, acquainted the said *J. B.* of the intent and meaning of the said declaration, and notice thereunder written.

To be sworn before a judge, if a town cause, and a commissioner, if in the country; ingrossed on a treble 6d. If the wife was served, then say, "*served the* If the wife
"*wife of J. B. the tenant in possession of the pre-* served.
"*misses*" (here mention on what part of the premises you served her, it being necessary as well in a town cause, as a country one). The affidavit must be positive that the tenant is *tenant in possession*; for information, or belief, will not do in this case.

Of Defect in the Affidavit of Service.

It often happens that an affidavit of the service of an ejectment is defective, such as not stating "*that the wife was on the premises at the time of the ser-*
N n 3 "*vice,*"

"vice," if brought for a dwelling house; if for land, not stating "*she was at the dwelling house of her husband the tenant,* and that *such dwelling house was situate in, &c.*" which is required. In this case the customary mode has been, when such defects can be ascertained, to get a supplemental affidavit made, which take to the clerk of the rules, he will attend a judge thereon, who will, on reading such affidavit, grant an order to draw up the rule.

New rule.
The clerk of the rules to keep a book of the rules delivered out in ejectment.

It is ordered, That the clerk of the rules of this court, shall for the future keep a book, in which shall be entered *all the rules* which from time to time shall be delivered out in ejectment, instead of the present book, containing a list of the ejectments moved; in which book shall be mentioned *the number of the entry, the county in which the premises lie, the names of the nominal plaintiff, (the first lessor of the plaintiff, with the words "and others" if there be more than one,) and also the name of the casual ejector.*

Rules for judgment to be taken away two days after end of the term the ejectment is moved.

And it is further ordered, That unless the rule for judgment be drawn up and taken away from the office of the clerk of the rules, *within two days after the end of the term in which the ejectment shall be moved,* no rule shall be drawn up or entered in the book, nor shall any proceedings be had in such ejectment. *R. M. 31 Geo. 3.*

The latter part of this rule has created great confusion in the practice, and many have been obliged to apply to a judge for an order, that the clerk of the rules may draw up the rule for judgment on an affidavit that they did not know of such a rule existing, and service of the summons on the tenant in possession, to shew cause against it.

To prevent mistakes, would it not be better to bespeak this rule, at the time you deliver over the motion? pay 5s. and 6d. more for every other tenant.

If no Appearance entered.

If no appearance in time.

If the tenant does not appear, and file his plea within the time limited, having drawn up the rule

for judgment (for which search at all the judges chambers, each of whom keep an ejectment book), enter on a double half crown stamp paper, the memorandum (if by bill), if by original "*the declaration only*," so far as the premises; get a roll, enter the warrants of attorney thereon, as on other judgments, only say, "*in a plea of trespass and ejectment*," and on producing your rule for judgment, the clerk of the judgments will sign it, and common bail must be filed for the casual ejector, pursuant to *R. M. 33 Car. 2.* if by bill; if by original, there need no appearance, for the rule says *common bail only*; then sue out a writ of possession thereon, pay signing judgment *4s. 2d.* if on one demise.

How to sign judgment against casual ejector.

Of amending Declaration.

It was formerly held, that a declaration in ejectment could not be altered or amended after once delivered, in the most trivial matters; but it has since been held, that an ejectment is a mere fictitious action, and the *demise* mere *matter of form*, nor *does it exist*; and on application, the *demise* was ordered to be amended; but this was to save the plaintiff from being barred by a fine, if he had been obliged to bring a new ejectment; *4 Burr. 2447. Doe v. Pilkington*; therefore as the *demise* may be altered, there can be no doubt but that other parts less material may also be amended, the action being invented under the control of the court, *for the advancement of justice*, and merely to try the *right in question*. *1 Burr. 665.* The term may be amended without consent from 5 to 10 years. *Str. 1272. Oates v. Shepherd. Vide 1211.*

Amending declaration.

A verdict cures a defect in setting out the title, though it cannot cure a defective title. *Stevens v. Evans. 2 Burr. 1159.*

The judges now amend declarations in ejectment, in the *demise*, after appearance, on a summons for that purpose.

N n 4

An

An ejectment is the mere creature of the court, and open to every equitable regulation, for expediting the true justice of the case. 2 Black. Rep. 940.

When to enter Appearance in Town.

Appearance in town.

If the tenements lie in London or Middlesex, and the notice in the declaration be to appear the first day of the term, the tenant has four days exclusive of one day, and including the other, to enter his appearance next after the motion; provided the motion be made before the last four days of the end of the term; if moved after, then until two days before the assign day of the subsequent term. If the notice should so happen as to be made to appear generally of the term, then the tenant has the whole term to appear in.

If in the Country.

In the country.

If the tenements lie in any other county, the tenant has four days after the issuable term, viz. Hilary or Trinity (although it is moved in Easter or Michaelmas), or if it be in a county, as Cumberland, where the assizes are held but once a year, then four days next after the end of the term preceding the assizes. It is said that the tenant cannot appear after the time allowed by the common rule for appearing is expired, Say. Rep. 151. but I think he may any time before judgment signed.

If term ends on Wednesday, tenant has all Monday to appear in, and judgment cannot be signed until Tuesday afternoon. Say. Rep. 303.

It cannot be signed until the afternoon of the fifth day. Ibid.

How to appear for the Tenant.

How to appear for tenant.

Get a blank consent rule from the stationers, pay 2d. fill it up in this manner (if you mean to defend for all the premises mentioned in the declaration),
and

and the defendant's attorney only signs it, leaving a blank space above for the plaintiff's attorney to do the like (for this is an agreement entered into by the parties, for the rule itself).

Hilary term, in the 32d year of the reign of king George the third.

Stormont and Way.

Middlesex, to wit. Doe, ex demise of Staples, against Roe, for 4 messuages, 4 barns, 4 stables, 500 acres of arable land, 500 acres of pasture, and 20 acres of furze and heath, in F. in the county of Middlesex.

It is ordered, by the Common consent rule,
consent of the attornies for both parties, that *Joseph Nix*, who claims title to the te-

nements in question, be made defendant in the stead of the now defendant *Richard Roe*, and do forthwith appear at the suit of the plaintiff, and file "*common bail*" (if the declaration be "*by original*," leave out the above words), and receive a declaration in an action of trespass and ejectment for the premises in question, and forthwith plead thereto, not guilty; and upon the trial of the issue, confess lease, entry, and ouster, and insist upon the title only; otherwise let judgment be entered for the plaintiff, against the now defendant *Richard Roe*, by default; and if upon the trial of the issue, the said *Joseph Nix* shall not confess lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute "*his bill*" (if by original say "*his writ*") against the said *Joseph Nix*, then no costs shall be allowed for not prosecuting the same; but the said *Joseph Nix* shall pay costs to the plaintiff in that case, to be taxed: And it is further ordered, that if upon the trial of the said issue, a verdict shall be given for the said *Joseph Nix*, or it shall happen that the plaintiff shall not further prosecute his said "*bill*," (if by original say "*writ*") for any other cause than for not confessing lease, entry, and ouster, then the lessor of the plaintiff shall pay to the said *Joseph Nix* costs in that behalf to be adjudged.

By the Court.

R. S. attorney for plaintiff.

R. G. attorney for defendant.

N. B. This Rule will do for a country cause.

This

Explanation of
the consent rule.

This rule confesses the lease supposed to be made to the plaintiff as stated in the declaration, his entry in consequence, and the defendant's ouster of him; therefore the trial now stands upon the merits of the title only; and the original declaration is now altered by inserting *Joseph Nix*, the real defendant, instead of *Richard Roe*, the casual ejector.

If a man is seized in fee of the premises in question, and they are in his own occupation, he enters into the common consent rule only, and not as landlord.

Tenants to give Landlords Notice.

Tenants must
give notice to
their landlords.

By 11 Geo. 2. c. 19. s. 12. "Tenants are obliged to give notice to their landlords of a declaration in ejectment being delivered, under pain of forfeiting three years improved or rack rent of the premises held by the tenant."

A tenant to a mortgagor who does not give him notice of an ejectment brought by the mortgagee, to enforce an attornment, is not liable to the penalties of 11 Geo. 2. c. 19. s. 12. for secreting ejectments. *Buckley v. Buckley*. 1 Term Rep. 647.

It extends to cases only where ejectments were brought, which were inconsistent with the landlord's title. *Ibid*. It appeared that the ejectment was brought for the purpose of compelling the tenant to attorn to the mortgagee, which the act expressly permitted him to do.

When rule filled
up, annex it to
plea, if it be by
bill, file com-
mon bail.

When the rule is filled up, annex to it the plea of the general issue of not guilty; and if the declaration be by bill, file common bail, and deliver a memorandum or warrant at same time on a 2s. 6d. stamp.

The clerk of
bails marks the
rule by consent
before plea filed.

The clerk of the common bails (if by bill) marks the rule by consent, then take rule and plea to one of the judges chambers, leave same, pay 2s. filing common bail in term, 1s. 2d. in vacation 4d. more.

If

If the declaration be by original, then take the rule If it be by original and plea with the memorandum to the filacer Mr. Adams, with a note of appearance, thus, on plain paper: "Middlesex, (js.) Appearance for Joseph Nix, at the suit of John Doe on the demise of Edward Staples;" he will sign your rule, and write on it, "Appearance entered," pay 2s. 6d. take same to one of the judges chambers, leave it, and pay 2s.

Hilary Term, in the 32d year of the reign of King George III. *Stormont and Way.*

Nix ats Doe, } And the said Joseph Nix, by J. J. Plea.
ex dem. of Staples. } his attorney, comes and defends the force and injury, when, &c. and says, that he is not guilty of the trespass and ejectment above laid to his charge, in manner and form as the said John Doe hath above thereof complained against him; and of this he puts himself upon the country, &c.

How to appear for Part.

If there be several persons who claim title, the rule may be drawn *generally* or *particularly*; generally, as that J. S. who claims title to the premises in question should be admitted for such messuages; and this puts a necessity on the plaintiff, to distinguish by proof, what tenements are in each tenant's possession, otherwise he can have no verdict. But if the rule be drawn *specialty*, that supercedes the necessity of proof that the lands are in his possession. *Buller 95.*

By rule T. 15 Car. 2. it is ordered, that in every action of trespass and ejectment, where the defendant, by the rule of the court, shall confess lease, entry, and ouster, for so much of the premises in the declaration mentioned, as are in the possession of the said defendant, or his under-tenants, the attorney for such defendant shall immediately deliver to the plaintiff's attorney, a certain note in writing of the tenements so being in the possession of the said defendant, or his under-tenants.

In ejectment defendant's attorney to give plaintiff's attorney notice of the tenements he defends for.

This

The present mode.

This mode is not now adopted, but instead thereof the *premises defended for*, is inserted in the margin of the rule, and at the end thereof say, *part of the premises mentioned in the declaration*; which makes the rule *special*.

When the appearance is for part, the plaintiff having obtained the rule for judgment against the casual ejector, may sign his judgment for the residue against the casual ejector.

Of Appearance by the Landlord.

Landlord empowered to make himself defendant, &c.

As the *tenant* in possession of the premises cannot be compelled to appear and enter into the common rule to become defendant instead of the casual ejector, so neither could the *landlord* alone, and without joining with the *tenant*, enter into such rule, and be made sole defendant, whereby great inconveniencies happened through the obstinacy of tenants; it is therefore provided by *stat. 11 Geo. 2. c. 19.* that if the *tenant* shall refuse to appear, judgment shall be signed against the casual ejector for want thereof; but if the *landlord* of any part of the land, &c. shall desire to appear by himself, and consent to enter into the like rule that the *tenant*, in case he had appeared, ought to have done, then the court shall permit such *landlord* so to do, and order a stay of execution upon such judgment against the casual ejector, until they shall further order therein.

Construction of the act.

By this statute it is provided, that the *landlord* may make himself a defendant, tho' the *tenant* refuses to appear; and tho' judgment is signed against the casual ejector, the court will order a stay of execution, until they make a further order.

A landlord made defendant without his tenant, may bring error.

The *landlord* appeared without the *tenant*, and after a verdict for the plaintiff, he brought a writ of error, upon which the plaintiff moved to take out execution; which the court refused to grant; for though it is left to their discretion, yet that can be only a legal one. The act intended to put the *landlord* in the place of the *tenant*, that he should not be stripped of his possession, by any act of the *tenant*, and it ought

ought to be considered as if the tenant had brought error, which would undoubtedly be a *superfedeas*. This court cannot take upon them to judge, whether is error in the proceeding or not. *Jones v. Edwards, Str. 1241.*

If a judgment be against the landlord, and the plaintiff move for leave to take execution against the casual ejector, if the landlord bring error, the day for shewing cause against this rule, is the proper time for so doing, and he may shew the writ of error for cause; otherwise the rule will be absolute, and he cannot open the matter again. *George v. Wisdom. 2 Burr. 757.*

If motion to take out execution against casual ejector after verdict, be made, landlord must then shew cause.

Who are considered as Landlords.

In ejectment for a chapel, the parson can only defend for a right to enter and perform divine service. *Str. 914.* Notwithstanding *1 Salk. 250.* No man is to be admitted tenant or defendant in ejectment by the common rule, unless he hath been in possession or received rent, and not a mere stranger. *Lord Holt. Comb. 209.*

If ejectment is brought by one claiming as heir of a copyhold, and the lord of a manor, who claims by escheat, *pro defectu hæredis*, applies to be admitted to defend with the tenant in possession, or alone; the court will direct the lord to bring ejectment against the heir, and the heir to be admitted to defend with tenant, or alone; if the lord refuses, they will discharge his rule to be admitted; if the heir refuses, they will admit the lord to defend. *Fairclain v. Shamtitle, 3 Burr. 1290.*

Heir and lord.

He who claims title shall be joined as a defendant, though plaintiff opposes it. *1 Salk. 256.* Though she is wife to the lessor. *257.*

Rule why *cestui que trust* should not be admitted to defend, was opposed, on a ground that they had never been in possession, and could not be considered as landlords. *Lord Kenyon.*—If the person requiring to be made a defendant under the act had stood in the

Cestui que trust.

the situation of *immediate heir* to the person *last seized*, or had been in the *relation of remainder man* under the same title as the original landlord, I am of opinion, he might have been permitted to defend as a landlord, by virtue of the directions of the statute; but here the very question in dispute between the adverse party and himself is, whether he is intitled to be a landlord or not? and therefore we are not authorised to extend the proviso of the statute in such a case as this. *Rule discharged. Lovelock v. Doncaster. 3 Term Rep. 783.* The reporter has taken it, that the devisees applied, but he corrects it in *4 Term Rep. 122.*

Heir.

The court permitted an *heir*, who had never been in possession, to come in and defend the ejectment: The father under whom he claimed died just after having first obtained a similar rule. *Doe dem. Thistlewaite v. Roe. 4 Term Rep. 122.* An affidavit must be made to ground this motion; so a mortgagee. *Comberb. 399. Jones v. Carwithen.*

How to appear for Landlord.

Give brief to counsel for him to move *that the landlord may be made defendant with the tenant; if he appears, and if the tenant does not appear, then that he may appear by himself, and enter into the common rule, and defend his title.* When the landlord desires to be made a party to defend the title of the land in question, together with the tenant in possession, the court will grant it, so that he will enter into the rule to confess lease, entry, and ouster.

N. B. This is done by a counsel's hand; for a landlord in possession without any affidavit, fee 10s. 6d. draw up the rule at the clerk of the rules, pay 8s. 6d. make a copy, and annex it to the plea; add also the *common consent rule* thereto, in which insert the landlord's name as defendant (and if he appear with the tenant, *his also must be inserted*); file appearance, or common bail, as the action is, with the memorandum on a 2s. 6d. stamp,

stamp, and leave plea at the judge's chambers, with the copy of the rules annexed.

At the trial the landlord must confess lease, entry, and ouster, and insist only upon the title; and if not, then the plaintiff is nonsuited, and judgment afterwards is to be entered against the casual ejector by default. *Sty. Pract. Reg.* 442. At the trial the landlord must confess, &c.

It is necessary to prove the defendant or his tenant in possession of the premises; for the rule is, that the landlord shall defend for the premises only whereof his tenants are in possession, and the party does not admit himself to be landlord of any premises which the plaintiff may make title to, but of such only as were in possession of those tenants. *Smith v. Mann*, 1 *Wils.* 220. When landlord is made defendant, plaintiff must prove his the defendant's tenant in possession.

If a verdict be for the plaintiff against the landlord, he must move the court for liberty to take out execution, on production of the *posse* and consent rule, which is a rule to shew cause only. If verdict for plaintiff.

If a judgment be signed against casual ejector, the landlord may move to set it aside on the ground of his tenants not having given him notice. And the court will make such a rule on the ground that the possession ought not to be changed where there had been no trial or opportunity of trying, though the obtaining the judgment might be owing to the default, or even treachery of the defendant's own tenant. But if the plaintiff had not been guilty of any collusion with the tenant, they thought it reasonable that the tenant, who was the person guilty, should pay the costs. *Doe ex dem. Troughton v. Roe*. 4 *Burr.* 1996. Judgment against casual ejector set aside, landlord having no notice of ejectment from his tenant.

A regular judgment was set aside in ejectment, without loss of trial on payment of costs, and the usual terms. *Dobb v. Passer*. 2 *Str.* 975. Regular judgment.

How to proceed after Plea filed.

When the time for appearance is out, search at the judge's chambers for plea and consent rule as before, take them and give receipt in the book, and if you mean When time for appearance is out, how to proceed.

mean to go to trial (first sign the name of the plaintiff's attorney to the consent rule), take same to the clerk of the rules, who will keep and file it, giving you the rule itself on stamp, pay him 10s. and 6d. for every name after the first; and when the issue is delivered, a copy of that rule is annexed on plain paper, for which you charge nothing.

Issue by bill,
what term to be
made of.

If the declaration be by bill, then make up your issue, with a memorandum of the term the plea is of, inserting the real defendant's name, instead of *Richard Roe*, the casual ejector. The memorandum of the issue will be the same as under title *issue*, only say, "*of a plea of trespass and ejectment.*"

Issue by original.

If it is by original, make your issue of the same term with the plea, but no memorandum. You begin with the declaration. Charge on the back of the issue thus: *Copy issue, fo. 10. 3s. 4d. duty and entering plea rs. 3d.*

Notice of trial.

The same time is allowed for notice of trial in ejectment as in other cases, both in town and country.

Of Infant Lessor.

Infant plaintiff
must name a
guardian.

If the lessor of the plaintiff is an infant, after the plea is filed, you may have a summons "*to shew cause why further proceedings should not be staid until a sufficient guardian is appointed for the lessor of the plaintiff, who will undertake to pay the defendant such costs as may be adjudged to him.*" And an order will be granted, although there is a real plaintiff named. You petition in the same manner to appoint a guardian, as under title *Infants*, and the guardian enters into the common rule, and employs an attorney for that purpose.

Of Security for the Costs.

Lessor of the
plaintiff must
give security for
costs.

Proceedings were stayed till the lessor of the plaintiff should give security for costs, his residence being in *Ireland*, though this ejectment was brought under the direction of the court of chancery, and

40l. security had been already given there. 2 Burr. 1177. *Doe v. Fulford*.

Where there has been a former ejectment, the Security for rule is, to stay the proceedings in the second ejectment till the costs of the former are paid, and not till security is given for the costs of the second. *Doe ex dem. Selby v. Alston, Bart.* 1 Term Rep. 491. Per Buller J.

How to proceed against absconding Tenants.

If the tenant in possession absconds, the court will, upon service of the *niece*, the only manager of the house, and resident in it, and fixing up another copy on the premises, make a rule to shew cause "why judgment should not be entered up against the casual ejector; and will further order that service of such rule on any person in the house be sufficient: or if no person be in the house, then to affix the same on the door." 2 Burr. 1116. See the like rule upon service on the maid, 1181. A like rule was made, why a preceding service upon a servant in the house of one *Hawkins*, tenant in possession, should not be deemed a good service; on its appearing that both *Hawkins* and his wife kept out of the way to prevent their being personally served: and if this was not so, the plaintiff (adds the reporter) would lose the assizes. *Ibid.* Vide 2 Burr. 1116.

So that if the tenant keeps out of the way on purpose, and leaves the servant in the house, serve the servant with the declaration, and then move the court on affidavit stating the special facts.

If servant refuses to call the master, or to take the declaration, the court on affidavit will order leaving it at the house to be good service. *Str.* 575. Vide 2 *Wils.* 263. where tendered to the wife; and *Barnes* 174.

Of making up the Record.

The record in ejectment is made up in the same manner as others, with two *placitas* of the term the
O o issue

Verdict.

issue is delivered, only say, "in a plea of trespass and "ejectment." After trial if the plaintiff obtains a verdict, give a rule for judgment, and tax the costs as in other cases.

Special verdict.

On a special verdict it ought to appear, that the lessor of the plaintiff *might enter* at the time he brought the ejectment. 1 Burr. 60.

Judgments in Ejectment.

Judgment by nil
dicit, with a re-
mittitur dampna.

And the said *Richard*, by S. U. his attorney, comes and defends the force and injury, when, &c. and says nothing in bar or preclusion of the said action of the said *John Doe*, but makes default, by which the said *John Doe* remains therein undefended against the said *Richard Roe*; therefore it is considered that the said *John* recover against the said *Richard*, his said term yet to come, of and in the tenements aforesaid, with the appurtenances; and upon this the said *John* freely here in court remits to the said *Richard* all such damages, costs, and charges, as he the said *John* hath sustained by occasion of the trespass and ejectment aforesaid; therefore the said *Richard* is free from those damages, costs, and charges, &c.; and upon this the said *John* prays the writ of the lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have his possession of his said term yet to come, of and in the tenements aforesaid, with the appurtenances; and it is granted to him, returnable on next after (if by original, on, where-soever), &c.

Final judgment
after special ver-
dict for the
plaintiff.

At which day, before our said lord the king at *Westminster*, come the parties aforesaid, by their attornies aforesaid; and upon this the premises being seen and fully understood by the court here, it is considered, that the said *John* recover against the said *A.* his term aforesaid yet to come, of and in the tenements aforesaid, with the appurtenances, and his damages aforesaid assessed by the said jury in form aforesaid, and also 90*l.* by the court of our

lord

lord the king now here adjudged of increase to the said *John* by his assent, which damages amount in the whole to 90*l.*; and that the said *A.* be taken, &c. And upon this the said *John Doe* prays the *Hab. fac. posses.* writ of our said lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have his possession of his said term yet to come, of and in the tenements aforesaid, with the appurtenances; and it is granted to him, returnable, &c.

Enter on the roll as far as to the end of the issue, Judgment in then say, At which day before our lord the king at *Westminster*, came the parties aforesaid by their attornies aforesaid, and the sheriff did not send the said plea and costs writ, nor did he do any thing thereupon; and here- taxed, and also upon the said *C. D.* by his said attorney, comes and for the possession, and relinquishes his averment by him in pleading above pretended, and says, That he cannot deny the said action of the said *John*, nor but that he the said *C.* is guilty of the trespass and ejectment aforesaid, in manner and form as the said *John* hath above thereof complained against him; and the said *John* further saith and acknowledges, that he hath sustained damages, by reason of the trespass and ejectment aforesaid, besides his costs and charges by him laid out about his suit in this behalf to 1*s.* and no more: and because the said *C.* doth not deny the same, but admits the allegation to be true, the said *John* prays judgment, and his damages so acknowledged in form aforesaid, together with his costs and charges aforesaid, may be adjudged to him, &c. Therefore it is considered, That the said *John* recover against the said *C.* his term aforesaid, yet to come of and in the tenements aforesaid, with the appurtenances, and the said 1*s.* damages in form aforesaid acknowledged, and also 7*l.* 10*s.* for his costs and charges by him laid out and expended about his suit in this behalf, to the said *John* by his assent, by the court of our said lord the king now here, adjudged; which said damages, costs, and charges, in the whole, amount to 7*l.* 11*s.* and that the said *C.* be taken, &c. And the said *John* prayeth

Judgment signed
—— day of
—— 1791.

prayeth the writ of our said lord the king, to cause him to have his possession of the term aforesaid, yet to come of and in the tenements aforesaid, with the appurtenances, and it is granted to him returnable on, &c.

How to proceed if there be a Nonsuit or a Verdict.

If plaintiff is nonsuited for want of confessing lease, entry, and ouster, &c.

If the defendant will not appear at the trial, and confess lease, entry, and ouster, the practice is to call the defendant and his attorney, if he be within the rule, and on his non-appearance, or on refusal to comply with the rule, to call the plaintiff and nonsuit him; then, at the plaintiff's instance, the cause of the nonsuit is indorsed on the *poslea*, which entitles the plaintiff to judgment against the casual ejector, when the *poslea* is returned into court, *Salk.* 259.

Joint defendants, one appears and confesses, &c. the other makes default.

If there are several defendants for the same premises, and some appear and confess, but others do not, the practice is to proceed against those who do appear, and enter a verdict for the rest; but then the cause of that verdict is indorsed on the *poslea*, which as to them, entitles the plaintiff to judgment against the casual ejector. *Lord Ray.* 729.

How to proceed after plaintiff is nonsuited on the merits, or a verdict for the defendant.

Where a verdict shall be given for the defendant, or the plaintiff shall be nonsuited for any other cause than for the defendant's not confessing lease, entry, and ouster, the defendant must proceed to tax his costs on the *poslea*, as in other actions, and sue out a *ca. sa.* against the plaintiff; and if upon shewing the writ under seal to the lessor of the plaintiff, and serving him with a copy of the rule by consent, and demanding the costs, the lessor of the plaintiff does not pay the costs, the court will grant an attachment against him, on affidavit of the facts.

How to proceed if plaintiff is nonsuited for want of confessing, &c.

If the plaintiff is nonsuited for want of confessing lease, entry, and ouster, you sign judgment against the casual ejector, as if no appearance was entered, upon a double half-crown stamp paper, having drawn

drawn up the rule for judgment. On the return day of the *distringas*, take the record and consent rule, with the judgment paper, to the master, and he will tax the costs on the consent rule; make a copy of the same; serve defendant therewith, and demand the costs; which, if not paid to the lessor of the plaintiff, he may on affidavit thereof, move for an attachment. There is no occasion to stamp the rule with a double half crown, nor the *possea*. Shew the original rule.

Formerly, after a nonsuit at the assizes, for want of confessing of lease, entry, and ouster, the plaintiff's attorney immediately signed his judgment and made out a writ of possession: but the practice is since altered, so that now it cannot be done, until after the *possea* comes in at the day in bank. *After nonsuit, cannot take out writ of possession until the day in bank.*
Styles 442.

The court held that after a nonsuit for want of defendant's confessing lease, entry, and ouster, the writ of possession cannot be taken out, till after the *possea* comes in on the day in bank. *Doe v. Copeland, 2 Term Rep. 780.* The *Common Pleas* determined otherwise, but Lord *Kenyon* said, that would not alter the mode of proceeding in this court, and he thought this the best way. *Vide Salk. 259. Turner v. Barnaby, exactly as this is.* *Same point and held same.*

If the plaintiff is nonsuited he may pay the costs to which of the defendants he pleases. *Str. 576.*

A new trial may, upon proper grounds, be granted in ejectment, as well as in other cases. *4 Burr. 2224. Goadtitle v. Clayton. New trial.*

A verdict cures a defect in setting out the title, though it cannot cure a defective title. *2 Burr. 1162.* The pleadings were entitled, *H. 1 Geo. 3.* the lease said to be made 33d year of said king, to hold from the quarter-day then last past; verdict was confirmed, as being a mere mistake of the clerk. *Ibid.* *Verdict cures a defect in the setting out of the title.*

Execution must be taken out according to what in right and justice is really recovered, and cannot be taken out for more; for the judgment is not to be taken out according to right, *Execution must be taken out according to right.*

be for a moiety only, it must be that he recover his term. 1 Burr. 366.

If verdict for plaintiff, may have *ca. fa.* or *fi. fa.* for costs.

If there be a verdict for the plaintiff, he may have a *ca. fa.* or *fi. fa.* for the costs, and a writ of *hab. fac. pos.* afterwards, or a writ of *possession* and *fi. fa.* together in one writ.

If lessor dies,

If lessor of plaintiff dies before issue joined, and before the assizes, and plaintiff is nonsuited for want of confessing of lease, &c. executor of lessor shall not have costs. 2 Wils. 7.

Defendant.

If in ejectment against two, one dies after issue, but before trial, the death must be suggested on the roll, and it must be awarded, that proceedings stay against the deceased, but no need of *quod quer. nil capiat*; and judgment must be, not for a moiety, but that plaintiff recover his term; but he must take execution for no more than he hath a right to recover.

1 Burr. 362. Far v. Denn.

Lessor dies,

If lessor of plaintiff dies, this cannot be pleaded *puis darrein cont.* because the right is supposed in the lessee. Hob. 5.

Of the Writ of Possession.

In real actions, where the freehold is recovered the demandant has execution, by the writ of *habere facias seisinam*; in ejectment, therefore, it is but just, that a similar remedy shall be permitted to the plaintiff, who, as he now has judgment to recover the possession of the land, may put the sentence of the law in execution by virtue of a writ of *habere facias possessionem*, directing the sheriff to give actual possession to the plaintiff of the land recovered. The mode of executing this writ is in my Office of Sheriff, P. 177.

It may be sued out though the lessor of the plaintiff be dead, if tested the *last day of the preceding term.* Doe dem. Beyer v. Roe. 4 Burr. 1970. The legal relation to the day of the *teste* is proper to be supported in maintenance of a writ of possession on a judgment in ejectment. Ibid.

George

George the third, &c. to the sheriff of *Middlesex*, A writ of possession by bill.
greeting: Whereas *John Doe*, lately in our court, ^a If by original, leave out the words "bill" "without."
before us at *Westminster*, by a bill without our writ,
and by the judgment of the said court, recovered
against *Richard Roe* his term yet to come, of and
in one messuage, &c. (*here describe the parcels as in the ejectment exactly*), with the appurtenances, situate,
lying, and being in in your county,
which *John Charles*, on the 2d day of *April*, in the
30th year of our reign, demised to the said *John*,
for a term of years which is not yet expired,
to hold from the 1st day of *April* then last past,
until the full end and term of five years from
thence next ensuing, and fully to be complete and
ended; by virtue of which demise the said *John Doe*
entered upon the same tenements, with the
appurtenances, and was possessed thereof, until the
said *Richard* afterwards to wit, on the same 2d
day of *April*, in the thirtieth year aforesaid, with
force and arms entered into the said tenements,
with the appurtenances, and then and there ejected,
drove out, and removed him the said *John Doe*
from his said farm, his said term then and
there not being expired, and him the said *John*
hath withheld from his possession thereof, and still
doth withhold, whereof the said *Richard* is convicted,
as appears to us of record: Therefore we
command you, that without delay, you cause the said
John Doe to have his possession of his term aforesaid,
yet to come of and in the tenements aforesaid,
with the appurtenances, and in what manner you
shall have executed this our writ, make appear to
us at *Westminster*, on *Monday* next after the morrow
of *All Souls* ^b; and have there then this writ. Witness,
&c.

George, &c. (to the end of the *hab fac. poss.* as far
as the return day), then say, We also command you,
that of the goods and chattels of the said *C. D.* in
your bailiwick, you cause to be made and levied
26^l. which the said *John Doe* lately in our said court
before us at *Westminster*, by bill without our writ,
and

N. B. To be ingrossed on a 2s. 6d. stamp parchment, pay signing with Messrs. Provest and Webb, 1s 8d. seal 7d.; a practice is necessary.

^b If by original say "on the morrow of All Souls, where-ever we shall then be in England."

Writ of possession, and si. fa. for costs.

and by the judgment of the same court, recovered against the said *C. D.* for his said damages which he had sustained, as well by reason of the trespass and ejectment aforesaid, as for his costs and charges by him about his suit in that behalf expended, adjudged to the said *John Doe* according to the form of the statute in that case made and provided, whereof the said *C. D.* is convicted, as also appears to us of record; and have you the said monies before us at *Westminster* on the said next after to render to the said *John Doe* for his damages, costs and charges aforesaid; and have there this writ. Witness, &c. *N. B.* This writ is to be signed and sealed, a *præcipe* is made for the office.

The sheriff grants a warrant on this writ; pay 2s. 4d. and he will put the lessor of the plaintiff in possession. One who recovers land part of a highway, must recover it subject to the easement, and the sheriff must deliver possession subject to it. 1 *Burr.* 133.

Writ of possession on two several demises,

George, &c. To the sheriff of *Middlesex*, greeting: Whereas *A. A.* lately in our court before us at *Westminster*, by bill without our writ, and by the judgment of the said court, recovered against *R. R.* his term yet to come, of and in five messuages, and one acre of land, with the appurtenances, in the parish of Saint *Luke* in your county, which *J. H.* on the first day of *October*, in the thirtieth year of our reign, at the parish of Saint *Luke* aforesaid, demised to the said *A.* To hold the same, with the appurtenances, to the said *A.* and his assigns, from the day of then last past, to the full end and term of five years, then next following: And whereas the said *A.* lately in our same court, before us at *Westminster*, by bill without our writ, and by the judgment of the said court, recovered against the said *R. R.* his term yet to come of and in five other messuages, and one other acre of land, with the appurtenances, in the said parish of Saint *Luke*, in your county, which *J. M.* on

M. on the day of in the thirtieth year of our reign, at the parish of Saint Luke aforesaid, demised to the said *A.* To hold the same, with the appurtenances, to the said *A.* and his assigns, from the 30th day of September then last past, to the full end and term of five years then next following; by virtue of which said several demises, the said *A.* entered into the said several tenements, with the appurtenances, and was possessed thereof; and the said *A.* being so possessed thereof, the said *R.* afterwards, to wit, on the said day of in the said thirteenth year, with force and arms, (*that is to say*) with swords, staves, and knives, at the said parish of Saint Luke, in your county, entered into the said several tenements, with the appurtenances, so demised to the said *A.* in manner aforesaid, for the term aforesaid, which is not yet expired, in and upon the possession of the said *A.* and ejected the said *A.* out of his said several farms; and him the said *A.* hath withheld from his possession thereof, and still doth withhold, whereof the said *R.* is convicted, as appears to us of record. Therefore we command you, that without delay you cause the said *A.* to have his possession of his said several terms, yet to come of and in the several tenements aforesaid, with the appurtenances; and that you certify to us at *Westminster*, on next after in what manner you shall have executed this our writ; and have you there then this writ. Witness, &c.

Frequently the defendant, after entering into the *Retraxit*. common rule, wishes to withdraw his plea, and confess the action; in that case you must enter a *retraxit*, or a *relicta verificatione* on the roll. *Vide Retraxit.* p. 408.

Attornment.

The tenant very frequently, to save the expence of sheriff's poundage and officers fees, attorns tenant to the lessor of the plaintiff; in that case, make
such

such attornment on a piece of paper, thus (naming the cause): Some do it on a 6s. stamp, which is the safest way.

Attornment.

Be it remembered, that we whose names are hereunder written, being the several tenants in possession of the premises belonging to F. G. situate and being in the parish of, &c. do hereby severally attorn tenants to A. B. of, &c. gentleman (*the lessor of the plaintiff in the above cause*), for such parts of the said premises as are in our respective possessions; and we, each and every of us, have this day severally paid to the said A. B. the sum of 1s. upon such attornment, on account, and in part of the rent due, and to become due from us severally and respectively, for and in respect of the said premises; and we do severally and respectively become tenants thereof to the said A. B. from the 25th day of March last past; as witness our hands, this day of 1791.

Proceedings under Stat. 4 Geo. 2. c. 28.

Proceedings under 4 Geo. 2. c. 28. s. 2. where there is a power to re-enter for non-payment of rent, and no sufficient distress to be found on the premises.

“ THAT in all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor hath a right by law to re-enter for non-payment thereof, and no sufficient distress be found on the premises to satisfy the same, the landlord shall and may, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises; or in case no tenant be in actual possession, then to affix the same upon the door of any demised messuage; or in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, &c. comprised in such declaration; and such affixing shall be deemed legal service, which shall stand in the name and place of a formal re-entry; and in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, it shall be made appear to the court, where the suit is depending

ing by affidavit, or to be proved upon the trial, in case the defendant appears, *that half a year's rent was due before the said declaration was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due; and that the lessors or lessor in ejectment had power to re-enter, then the lessor shall recover judgment, and have execution; which if the lessee suffer, without paying the arrears and costs, and without filing a bill in equity, to be relieved within six months, he shall be barred from all relief, other than by writ of error; and the lessor shall hold the premises discharged from the lease; but if the tenant or lessee tender to the lessor, or bring into court the rent in arrear, together with costs, all further proceedings shall cease: and if the lessee be relieved in equity, he shall enjoy the demised premises, according to his lease, without obtaining a new one.* *N. B.* This is not to bar the right of a mortgagee, who may pay the rent in arrear within six months, and costs.”

What the affidavit ought to contain.

Bill in equity not filed within six months, no relief.

“ If the lessee file a bill in equity for relief, he must bring into court in forty days after the lessor's answer, so much as he could swear to be due, over and above the costs, there to remain till hearing.”

If lessee file a bill, he must bring into court all rent, &c.

Ibid. sect. 3.

Provided, if the tenant shall, before the trial, pay or tender to the lessor, &c. or pay into court all the rent, with costs, further proceedings shall cease.

If tenant before trial pay, all further proceedings to cease.

sect. 4.

The true construction upon this act is, to take off the landlord the inconvenience of his continuing always liable to an uncertainty of possession (from its remaining in the power of the tenant to offer him a compensation at any time, in order to found an application for relief in equity), and to limit and to confine the tenant to six calendar months after execution granted, for his doing this; or else that the landlord shall from thenceforth hold the demised premises discharged from the lease. 1 Burr. 619. *Doe v. Lewis.*

Construction of the act.

If

Tenant may
apply to pay
rent, &c.

If the tenant is served with a declaration in ejectment upon this act of parliament, he may apply by summons to stay proceedings upon payment of the rent and costs to be taxed; and if he tender the rent *before ejectment delivered*, court will stay proceedings with costs.

Ejectment how
to be prepared.

The ejectment is prepared as before (it is not necessary to make an actual entry or seal a lease), laying your demise after the rent became due, which is generally *twenty days* after the quarter ended; after service thereof, the following affidavit is necessary, naming the cause:

Affidavit to move
for judgment.

J. K. the lessor of the plaintiff in this cause, and *J. B.* of, &c. gentleman, severally make oath and say; and first this deponent *J. B.* for himself saith, That on the day of last past, and for several days before, the messuage in the annexed declaration of ejectment mentioned, was shut up, and there being no tenant in the possession thereof, he this deponent did, on the day of last, affix a copy of the said declaration in ejectment, hereto annexed, and the notice thereunder written, upon the door of the said messuage, late in the tenure of the said *A. B.* being the most notorious part of the said premises. And this deponent *J. K.* for himself saith, That before such declaration in ejectment was affixed as aforesaid, there was due to him as landlord of the said premises, from the said *A. B.* the tenant thereof, the sum of 14*l.* for half a year's rent, upon and by virtue of a certain indenture of lease, bearing date the day of 17 , and made between this deponent of the one part, and the said *A. B.* of the other part; and that no sufficient distress was then to be found upon the premises, *counter-vailing the arrears of rent then due to this deponent*: And this deponent further saith, That he had, at the time of affixing of the said declaration in ejectment upon the door of the said messuage, power to enter on the said premises therein mentioned, by virtue of the said lease, for the non-payment of the rent so in arrear as aforesaid. *Vide Cooke's Rep.* 68.

Move

Move on this affidavit as before, for judgment How to move against the casual ejector, pay counsel's fee 10s. 6d.; for judgment. and if no appearance and plea, draw up rule, and sign judgment.

Where there is no stipulation in the lease for entry When landlord without demand, you may notwithstanding, enter may enter. without demand, provided six months rent is in arrear, and there is not a sufficient distress; otherwise, in such cases, you must make a demand. *Goodright v. Cator. Dougl. 486.* An actual entry is not necessary to maintain this ejectment. *Ibid. 485.* An actual entry not necessary. 2 *Ld. Ray. 750.* 1 *Salk. 259.*

If the tenant appears, and pleads upon the trial, If tenant appears and pleads, what proof requisite. all the matters in the above affidavit must be proved. 1 *Burr. 614.*

Proceedings by a Mortgagee.

If the mortgagee have a right of entry, and the premises be tenanted, he may serve an ejectment, but if the premises be vacant, then he must seal a lease thereon as before stated.

It appears that a mortgagee may recover in ejectment (without notice to quit) against a tenant who claims under a lease from the mortgagor granted after the mortgage, without the privity of the mortgagee. *Keech v. Hall. Dougl. 21.* When no notice.

But if there is a tenant from year to year, and the landlord mortgages, pending the year, the tenant is intitled to six months notice from the mortgagee. *Birch v. Wright. Ibid.* When necessary.

It is said, that if the mortgagee has encouraged the tenant to lay out money, he cannot maintain this action. *Ibid. Cowp. Rep. 473.* If he has encouraged tenant.

When the mortgagor is left in possession, the true inference to be drawn, is an agreement that he shall possess the premises at will in the strictest sense, and therefore no notice is ever given him to quit, and he is not even entitled to reap the crops as other tenants at will are, because all is liable to the debt; on payment If the mortgagor be left in possession after mortgage.

ment of which, the mortgagee's title ceases. *Dougl. 22. Moss v. Gallimore, 279.*

Lease.

The mortgagor has no power express or implied, to let leases not subject to every circumstance of the mortgage. *Dougl. 22.*

Mortgagee may proceed if he has given notice to the tenant that he will not disturb him.

The courts have gone so far as to permit the mortgagee to proceed by ejectment, if he has given notice to the tenant that he does not intend to disturb his possession, but only requires the rent to be paid to him, and not to the mortgagor. *Lord Mansfield. Dougl. R. Moss v. Gallimore, 282.*

After notice, he is entitled to rent in arrear.

A mortgagee after giving notice of the mortgage to the tenant in possession under a lease prior to the mortgage, is intitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and he may distrain for it after such notice. *Moss v. Gallimore. Dougl. 279.*

The stat. 7 Geo. 2. c. 20. enacts, "That where an ejectment is brought by a mortgagee to recover the possession of mortgaged premises, if pending the suit, the person who has a right to redeem, shall appear and pay the mortgage, or bring into court the principal, interest, and costs, to be computed by the proper officer, he shall be discharged from the mortgage; and the court shall, by rule, compel the mortgagor to reconvey the premises, and deliver up all deeds relating to the title of the same."

A judge's order will do.

A judge's order may be had for this purpose: and the master is to make all just deductions and allowances on paying off the mortgage,

I applied under this act after a writ of possession by summons to pay principal, interest, and costs; and the lessor of plaintiff's attorney objected to come into the terms. Mr. Justice Buller said, do you chuse to have a bill to redeem? if so, I cannot relieve. But, by consent, he made the order. *Doe ex dem. Bunce v. Roe, E. T. 1791.*

Court will order all proceedings to be staid on payment of principal, &c.

If the mortgagee bring an ejectment, the court will order him to shew cause why, on payment, or bringing into court, principal, interest, and costs, proceed-

proceedings should not be stayed. *Str.* 413. Now done by summons.

On the application of the mortgagor, or his assignee, of the equity of redemption, the court will stay proceedings on payment of principal, interest, and costs, without paying money due on bond: but not if it was an heir. *Str.* 1107. *Archer v. Snatt*, *Eq. Caf.* 325. *Andrews*, 341.

The like without payment of a bond for money lent.

On payment of principal, &c. court will stay proceedings, and on bond for performance of covenants in a deed of mortgage, and will discharge defendant out of custody, though he had agreed to convey the equity of redemption to plaintiff, if no tender was made of conveyance to be executed. *1 Wils.* 80. *Skinner v. Stacey*.

On payment, will stay proceedings on bond, &c.

How to recover the Mesne Profits, and from what Time.

If judgment be obtained in ejectment, bring an action for the mesne profits; and as it is consequential to the recovery, it may be brought either in the name of the *nominal plaintiff*, or in the name of his lessor; and in either shape, it is equally his action *against the tenant* in possession, to recover the value of the profits, unjustly received by the tenant, in consequence of the ouster complained of in the ejectment; for after a recovery in ejectment, the tenant is estopped from controverting the plaintiff's title, in a subsequent action for the mesne profits, provided the plaintiff only proceeds for mesne profits, *from the time of the ouster complained of* in ejectment; but if he proceed for *antecedent profits*, he must prove his title to the premises from whence they arose, to shew his right to receive them. *2 Burr.* 668. *Aslyn v. Parkyn*.

In order to prove the plaintiff's title, it is only necessary to produce the office copy of the judgment in ejectment, where the judgment is after verdict, together with the attorney's bill; but if by default, then a writ of possession executed is necessary. But a learned

Proof required in such action.

Jury are not confined to the mere rent.

a learned author says, that the latter does not seem requisite, for if the tenant be concluded by the judgment in ejectment from controverting the plaintiff's title, he is consequently concluded from controverting his possession, because his possession is part of his title. As to the value of the mesne profits, they must be proved; but in estimating that value, the jury are not confined to the mere rent of the premises, for they may give whatever damages they think proper, though the defendant may plead the statute of limitations, and by that means protect himself from all but the last six years. *3 Wils. 121. 2 Burr. 667. Bull. N. Pri. 88.*

If brought by nominal plaintiff, court will stay the proceedings till security.

And in case an action be brought by the nominal plaintiff, the court, on application, will stay the proceedings thereon, till security is given for costs. *Ibid.*

Tenants in common may have this action.

If one tenant in common recovers in ejectment against another, he may have an action for the mesne profits. *3 Wils. 118.*

Cannot pay money into court.

The defendant cannot pay money into court in an action for mesne profits. *2 Wils. 115.*

How to remove an ejectment from the Mayor's court, London.

In *ejectment*, a writ of *habeas corpus* is the proper process to remove the plaint (under which the defendant must appear in this court, and enter into the common rule, and plaintiff must declare *de novo*), and not a writ of *certiorari*, as in replevin, whereby, after the record removed, the parties are to proceed upon it, and not begin *de novo*.

Consolidating Declarations.

TEN declarations on the same demise were delivered for 10 houses in *Steyning*, in *Suffex*, in the occupation of 10 persons. The court was moved to have them all put in one issue, suggesting that the title was the same in all, but refused. *Str. 1149.* The application should be made early, and before issue delivered, or I am afraid you will have to pay for all the issues, if made up separately. If there is a mortgage on 10 houses to *A.* and there be 10 tenants,

nants, and the premises in one county, surely the court will not suffer an attorney to make 10 causes on the same demise at this time, since the case of *Cecil v. Briggs*, 2 Term Rep. 639.

Bankrupts.

IF any bankrupt, who shall have obtained his certificate, shall be taken in execution, or detained in prison, on account of any debts due before he became bankrupt, by reason that judgment was obtained before such certificate was allowed and confirmed, it shall be lawful for any one or more of the judges of the court wherein judgment has been so obtained, on such bankrupt's producing his certificate, allowed, to order any sheriff, &c. who hath any such bankrupt in his custody, by virtue of any such execution, to discharge such bankrupt out of custody, without payment of any fee. 5 Geo. 2. c. 30. s. 13.

If the bankrupt was in custody before his certificate is signed, and afterwards it is allowed, apply to a judge, at his chambers, for a summons to shew cause why he should not be discharged, he having obtained his certificate; which, upon producing, and an affidavit (if the attorney does not attend for the plaintiff) of the debt having accrued before he became a bankrupt, the judge will grant an order upon the third summons, on affidavit of the service.

Cases relating to Bankrupts.

An execution against the goods of a bankrupt, taken out after his certificate is signed by the creditors, and before it is allowed by the chancellor, is valid. *Callen v. Meyrick*, 1 Term Reports, 365.

A bond and warrant of attorney to confess judgment given by a bankrupt after his bankruptcy, in order to obtain his liberty, is not barred by his certificate, although the original debt was contracted before.

before. And if the obligor were in custody, charged in execution, it is not necessary that an attorney should be present, on his part, at the time of executing the bond and warrant. *Birch v. Sharland*. 1 Term Rep. 715.

Cannot be discharged from an extent.

If the bankrupt be in custody at the suit of the king, on an *extent*, he cannot be discharged therefrom. 1 Atk. 220.

A bankrupt in custody, on an attachment for the non-performance of an award, discharged, on having his certificate.

A bankrupt was taken upon an attachment for not performing an award; after which he became bankrupt, and obtained his certificate; and the court held, that this was a demand for which an action of debt will lie; and the act says, he shall not be arrested, &c. for any debt due before the bankruptcy; and therefore he was discharged. 2 Str. 1152. *Baker's case*.

A bankrupt discharged from a judgment given after his bankruptcy, for a debt due before.

On motion to discharge a bankrupt out of execution, on the Stat. 5 Geo. 2. c. 30. it appeared, that the debt was contracted before the bankruptcy, and sued for and recovered pending the commission, and before any certificate obtained; and the judgment was afterwards affirmed on error, and costs given on such affirmance. The court discharged him as to all; for not having his certificate, he could not plead to the action; and these costs were attendant on the original judgment, and cannot be considered as given for delay of execution, when it appears there ought to have been no execution, though no writ of error had been brought. 2 Str. 1196. *Graham v. Benton*.

When the certificate will discharge the debt.

A certificate discharges a bankrupt from a debt accruing before the commission, though judgment be not obtained till after the certificate allowed. *Boutflower v. Coates*. Cowp. Rep. 25.

A certificate under a second commission.

A certificate obtained under a second commission is void, for a second commission cannot be taken out against an uncertificated bankrupt, because all his effects belong to the creditors of the first: therefore, when he had put in bail, and an application for an *exoneretur*, the court refused. *Martin v. O'Hara*. Cowp. Rep. 823.

The penalty of a bond for securing an annuity having once been forfeited before a bankruptcy, the value of the annuity may be proved, and the certificate is a discharge from future payments, notwithstanding the arrears shall have been paid after the forfeiture, and before the bankruptcy. *Willie v. Wilkes*, Dougl. Rep. 520. Annuity bond when forfeited.

A certificate will be no bar to an action for the mesne profits, for as the damages are uncertain, they cannot be proved under the commission. *Goodtitle v. North*. Ibid. 584. Vide if the demand is such that the amount can be liquidated. 3 T. Rep. 539. *Utterton v. Vernon*. Mesne profits;

But if an action be brought upon a bail-bond against the bankrupt himself, though he is discharged from the original debt by his certificate, yet he is not from this; for the court said, that this was a new debt, and distinct cause of action, and therefore refused to relieve the bankrupt, and ordered the sheriff to pay the money to the plaintiff. *Cockerill v. Owston*. 1 Burr. 436 But court said, the certificate shall discharge proceedings depending against bail, in an action upon the old debt, who are not already fixed. Ibid. Certificate will not discharge the bankrupt upon an action on bail bond.

The defendant, 9th May 1734, was bail in error: 25th October following he committed an act of bankruptcy, and after got his certificate. On 12th November judgment affirmed; and to an action on the recognizance he pleaded his certificate: held he was not discharged; for it was a contingent debt, for which the plaintiff could not come in under the commission, the Stat. 7 Geo. I. c. 51. only letting in those where the payment was certain, though future. 2 Str. 1043. *Hockley v. Merry*. When there is an act of bankruptcy between becoming bail in error and affirmation, no discharge.

A surety of a bond who pays the debt after the bankruptcy of his principal, is not barred by the certificate, though the bond was forfeited before the bankruptcy. Cow. Rep. 525. *Taylor v. Mills*. A surety of bond.

A surety who does not pay the principal till after his bankruptcy, though called upon and liable to pay it before, may hold the principal to bail, notwithstanding

The rule respecting sureties.

withstanding his certificate. *Vide* 3 *Wils.* 262. *Goddard v. Vanderheyden. Ibid.* 346. *Young v. Hockley.* The rule of law is, that though a party make himself liable for the debt of another by a contract prior to the bankruptcy of such other person, and he does not actually pay that debt, till after the commission of bankruptcy, he cannot prove his debt under the commission. Here it was not paid till afterwards; and as the debt only accrued by actual payment, there was no debt to which he could swear at the time of the bankruptcy. *Paul v. Jones, 1 Term Rep.* 599.

Bankrupt sued as an executor, and pleads a false plea, is liable to costs, certificate before, no discharge.

A bankrupt being sued as an executor, pleaded a false plea, which being found against him, the plaintiff had judgment *de bonis propriis* for the costs; after which he obtained his certificate. *Cur.* The pleading a false plea was his own act, and his own fault; and the judgment and execution *de bonis propriis*, for costs, was singly owing to his false plea, which was subsequent to the issuing of the commission; consequently could not have been proved under the commission, and therefore cannot be discharged by the certificate. *Howard v. Jemmett, 3 Burr.* 1368.

Interest and costs.

If the cause of action arises before the bankruptcy, interest and costs accrued since, are likewise discharged. *Cowp. Rep.* 138. *Blandford v. Foote. 2 Str.* 1156. 1 *Wils.* 41.

How Bail are to be relieved.

If bail are proceeded against of a bankrupt, they may before a *scire facias* be returned *scire feci*, or before the return of the second *sci. fa.* (in case the bankrupt has obtained his certificate) apply by summons for an *exoneretur* to be entered on the bail-piece, on the defendant having obtained his certificate, and on producing the certificate, and affidavit of the debt having accrued before the bankruptcy of the defendant, the judge will on the third summons on affidavit

vit of the service and attendance, grant an order for that purpose.

The rule is, if the certificate be obtained, *before* Rule. *the bail are fixed*, they shall be discharged; but if they be fixed *before the certificate is obtained*, they remain liable. *Woolley v. Cobb. 1 Burr. 244.*

Notwithstanding a bankrupt cannot be discharged out of custody upon an arrest, before his certificate is allowed, yet if the creditor prove his debt under the commission, the defendant may, by petition, apply to the court of Chancery, for him to elect, whether he will proceed at law, or take his debt under the commission; and though he does make his election, yet he may assent to, or dissent from, the certificate. *1 Atkins 220.*

If bankrupt in custody at the suit of a creditor, who has proved his debt, he may petition for plaintiff to elect.

In Chancery. In the matter of *A. B.* a bankrupt.

To the Right Honourable the Lord High Chancellor of Great Britain.

The Humble Petition of the said Bankrupt, Sheweth,

That a commission of bankrupt, on the day of 1788, was issued under the Great Seal of Great Britain, against your petitioner, directed to *U. B. H. H. H. R. H. C.* Esquires, and *R. H.* Gentleman.

That *J. C.* of in the county of weaver, a creditor of your petitioner, did prove, at one of the meetings under the said commission, a debt due to him from your petitioner, to the amount of 150*l.*

That the said *J. C.* lately issued out of his Majesty's court of *King's Bench*, against your petitioner, a writ of *latitat*, returnable on *Saturday* next after the *morrow of All Souls*, and caused your petitioner to be arrested for the said sum of 150*l.* so proved under the said commission.

" Your petitioner therefore most humbly prays

" your Lordship, to order the said *J. C.*

" forthwith to make his election either

P p 3

" solely

“ solely to proceed at law against your
 “ petitioner, or take his said debt under the
 “ said commission: And that in case he
 “ should elect to take the said debt under
 “ the said commission, that then your
 “ Lordship will be pleased to order the said
 “ J. C. to release your petitioner from the
 “ said action, at his own costs and charges;
 “ or that your Lordship would be pleased
 “ to grant your petitioner such other relief
 “ in the premises as to your Lordship may
 “ seem meet.

“ *And your petitioner shall ever pray, &c.*”

How to proceed
 upon this peti-
 tion.

This petition is to be ingrossed on a treble six-penny stamp paper, and left at the bankrupts office, *Bell-yard*, with a fair copy for the chancellor, upon plain paper. When he has answered it, serve copy on the plaintiff's attorney and his client, make affidavit thereof, and also let the defendant make affidavit that the plaintiff has proved the debt under the commission, and that he does not stand indebted to him in any other sum. Upon the hearing of the petition, get solicitor under the commission to attend with the proceedings; pay him 20s.

Proceedings against Prisoners.

IF any person is in custody of the marshal or keeper of any other prison, it will behove the practitioner to take care, and observe the rules laid down in the strictest manner, in proceeding against him; otherwise his client may lose the custody of the prisoner, the law paying the highest regard to the liberty of the subject.

Formerly when any defendant was detained in custody by mesne process of this court for want of bail, if the plaintiff did not, within *two terms* after the arrest, cause the defendant to be brought by *habeas corpus* and committed; so that he might declare against

against him in custody of the marshal, the defendant might be discharged out of custody upon common bail or appearance, but now by stat. 4th and 5th year of *W. and M. c. 21. § 2.* it is enacted, *That if any defendant be taken or charged in custody, at the suit of any person on any writ out of any of the courts at Westminster, and imprisoned for want of sureties, the plaintiff in such writ may, before the end of the next term after such writ shall be returnable, declare against such prisoner in the court where such writ shall issue, whereupon the said prisoner shall be taken or charged in custody; and may cause a true copy to be delivered to such prisoner, or to the gaoler or keeper of the prison, in whose custody he shall remain; to which he shall appear and plead; and if not, the plaintiff shall have judgment.*

The present mode for delivering declarations against prisoners.

That on all such declarations on process out of this court, it shall be alledged, “*in custody of what sheriff, bailiff, or steward, or other person, such prisoner shall be at the time of such declaration, by virtue of the said process of the said court, at the suit of the plaintiff.*” *Sec. 3. N. B.* This means where the proceeding is by *bill*, but if by special original, the old form is adhered to.

To be alledged in declaration, in whose custody prisoner is.

When you declare against a prisoner in custody of the sheriff, you must alledge him to be, “*at the suit of the plaintiff,*” or the declaration is ill. *1 Wilf. 119. Ld. Ray. 1362.*

In declaration it must be alledged at whose suit detained.

By rule *H. T. 26 Geo. 3. it is ordered,* That from and after the last day of this term, in all cases where a prisoner is or shall be taken, detained or charged in custody by *mesne process*, hereafter returnable issuing out of this court, and the plaintiff shall not cause a declaration against such prisoner to be delivered to such prisoner, or to the gaoler or turnkey of the gaol or prison, where such prisoner is or shall be detained, or charged in custody, *before the end of the next term after the return of the process by virtue whereof such prisoner is or shall be taken, detained, or charged in custody:* and (unless the prisoner is or shall be in custody of the marshal)

New rule respecting the declaration against prisoners.

Affidavit.

cause an affidavit to be made and filed with the clerk of the rules of this court of the delivery of such declaration, and the time when, and the person to whom the same was delivered, before the first day of the next term after the delivery of such declaration, the prisoner shall be discharged out of custody by writ of *superfedeas*, to be granted by this court or one of the judges thereof, upon filing common bail; unless, upon notice given to the plaintiff's attorney, good cause shall be shewn to the contrary:

In case of commitment or surrender.

And in case of commitment or surrender to the marshal in discharge of bail, after the return of process, and before a declaration delivered, unless the plaintiff shall cause declaration to be delivered, as aforesaid; before the end of the next term after such commitment or surrender shall be made, and due notice of such surrender given, the prisoner shall be discharged out of custody by writ of *superfedeas*, to be granted as aforesaid, upon filing common bail; unless upon notice given to the plaintiff's attorney, good cause shall be shewn to the contrary. And it is further ordered, that in all cases where a prisoner shall be taken or charged in custody by any sheriff or other officer by *mesne process* of this court, and shall be afterwards removed by writ of *habeas corpus* and committed thereupon by this court, or any of the judges thereof, to the custody of the marshal, the time for the plaintiff's proceeding against such prisoner shall commence and be computed from the prisoner's being first taken or detained, or charged in custody, by virtue of such process.

If a *habeas corpus* and commitment, how to proceed.

No treaty to prevent, unless it be in writing.

That no treaty or agreement shall be sufficient cause to prevent any defendant's having the benefit of a *superfedeas* for want of prosecution, unless the same be in writing, signed by the defendant or his attorney, or some person duly authorized by the defendant, and it be therein expressed, that proceedings are staid at the defendant's request. *Ibid.*

Plaintiff must declare in two terms on an escape warrant,

That where any defendant, being a prisoner in custody of the marshal of this court upon *mesne process*, shall be taken and detained in custody of any sheriff

sheriff of this kingdom, by virtue of a judge's warrant of this court, for an escape made from the custody of the marshal, "It is ordered that the plaintiff in such action shall declare against the said defendant in custody of such sheriff, before the end of the second term after such taking, otherwise a *superfedeas* may be made for such defendant." R. T. 6 Ann.

How to proceed after Arrest in Custody of the Sheriff.

By rule E. 5 W. & M. reg. 3. It is ordered that no copy of a declaration be delivered to any prisoner in custody, before the day of the return of the process upon which the defendant was taken or charged in custody. Not to deliver declaration before return of process.

An amendment was made in a declaration against a prisoner being intitled 30th year, instead of 31st year. *Per Buller J.* Amendment.

Surrey, } *John Denn* complains of *Richard Fenn* to wit. } being in the custody of the sheriff of the county of *Surrey*, by virtue of his majesty's writ of *habeas corpus*, issued out of the court of our lord the king, before the king himself, against the said *Richard*, at the suit of the said *John*, returnable before the king himself at *Westminster*, on *Friday* next after the morrow of the *Holy Trinity*, of a plea of trespass on the case, for that whereas (as in other declarations). Add pledges. Declaration against a prisoner in custody of the sheriff.

Ingross one copy on treble penny stamp parchment, and file it with the clerk of the declarations, then make three other copies on treble 1d. paper, one of which deliver to the gaoler or turnkey, in whose custody defendant is, asking him "if defendant is a prisoner at the suit of the plaintiff," pay him 1s. if he acknowledges defendant to be in his custody, make an affidavit of the service, and swear it either before a judge, or commissioner in the country, annexing one of the copies of the declaration delivered there-to; when it is sworn, make an office copy of the affidavit of the service on treble 6d. and annex it to the other Of delivering and filing declaration.

other copy of the declaration, take both to the clerk of the rules, who will keep the one, and give a rule to appear and plead on the other copy, bring back the same; pay 3s. 10d.

John Denn, plaintiff,

In the *King's Bench*.

and

Richard Fenn, defendant.

The affidavit,

A. B. of, &c. gentleman, maketh oath and faith, That he did on the day of last past, deliver unto *C. D.* gaoler or keeper of his majesty's gaol in and for the county of *Surrey*, a true copy of the declaration hereunto annexed; and the said gaoler or keeper then acknowledged to this deponent, that the said defendant was a prisoner in the said gaol, at the suit of the said plaintiff *John Denn*, by virtue of a writ of *latitat* issued out of this honourable court, returnable before the delivery thereof.

The affidavit is to be filed before the first day of the next term, after delivery thereof.

No demand of plea in custody of sheriff is necessary.

It is determined that where a prisoner is in custody of the sheriff, *no demand* of a plea is necessary, but if he be in custody of the marshal, *it is necessary*. *Per Mr. J. Buller. Rose v. Christfield. 1 Term Rep. 591.*

Rule to plead may be given after the first rule.

If you forget to sign judgment within the time limited by the rule, you may, in the *next term*, give a *fresh rule*, and for want of plea, sign judgment.

N. B. You are to proceed to *final judgment*, within three terms *next after declaration delivered*; the term wherein such declaration shall be delivered, is to be taken as one. *Vide further on for the rule, H. 26 Geo. 3.*

Must be charged in execution within two terms.

After you have obtained final judgment, the prisoner must be charged in execution, within *two terms* next after such judgment so had and obtained, the *term* in which the judgment is signed to be accounted one of the two terms, *R. H. T. 26 Geo. 3.* unless prevented by error or injunction.

How to charge defendant in execution in custody of the sheriff,

Make out a *ca sa.* and lodge it with the sheriff of the county, which is sufficient, pay him 2s. 4d. (and

(and it is absolutely necessary that the judgment be entered, docketed, and filed of record, before this is done).

If a *ca. sa.* be returnable on the *Ascension-day*, and If *ca. sa.* be re-
prisoner be charged therewith, a judge will discharge turnable on a
him out of custody. Mr. J. Buller did this. *dies non.*

If the defendant be in custody in *Newgate*, *Lud-* If defendant in
gate, or any other county or city gaol, at the suit of custody in *New-*
any other person, the plaintiff must sue out process gate, &c. at the
against him directed to such sheriff, &c. as the case suit of any other
is, and such process must be left with him at his plaintiff.
office, in order to charge such defendant in custody.
In this case make affidavit, and sue out writ as in
other cases; pay sheriff for charging him in custody
2s. 4d. and such plaintiff must proceed against the
defendant as before directed, otherwise he will be
superfeded; and, *N. B.* he is to file a bill in this
case before he delivers the declaration. *Sayer's*
Rep. 49.

How to proceed if the Defendant be in custody of the
Marshal ats. same Plaintiff.

Ordered, That the rules of the King's Bench prison, New rule re-
shall be comprized within the bounds following, ex- relating to the
clusive of the public houses hereinafter mentioned; extent of the
from Great Cumber Court, along the north side of rules of the
Dirty Lane, and *Melancholy Walk*, to *Black Friars* prison.
road; and along the western side of the said road
to the Obelisk, and from thence along the south west
side of the *London road*, round the direction post in
the centre of the roads, near the public house, known
by the sign of the *Elephant and Castle*, and from
thence, along the eastern side of *Newington causeway*,
to *Great Cumber Court* aforesaid. That the new
gaol, *Southwark*, and the highway, exclusive of the
houses on each side of it, leading from the King's
Bench prison, to the said new gaol, shall be within
and part of the said rules.—That all taverns, victu-
alling houses, alehouses, and all wine-vaults, and
houses or places licensed to sell gin, or other spirituous

ous liquors, shall be excluded out of, and deemed no part of the said rules. *E. T. 30 Geo. 3.*

Day rules.

No prisoner be intitled to have day rules above *three days in each term*: and having a day rule, shall return within the walls or rules of the prison, at or before nine of the clock in the evening of the day for which such rule shall be granted. *R. E. 30 Geo. 3.*

How to proceed if defendant is in custody of the marshal.

If the defendant be in custody of the marshal of the *King's Bench* prison, at the writ of the same plaintiff, then make two copies of the bill, one on parchment, the other on paper, treble *1d.* file the bill first, then deliver the copy to the *turnkey*, or prisoner himself, but it is best to the turnkey; pay *1s.* and in this case *no affidavit* is requisite; but you give a rule to plead, and demand a plea as in other cases.

When to plead.

When a bill is filed against a prisoner in custody of the marshal, if a copy of it be delivered for him to the turnkey, *four days exclusive* before the end of the term in which the writ is returnable, a rule to plead being given, and plea demanded (not on the back of the declaration), the defendant shall plead as of that term, or judgment may be signed; but if the bill be not filed, and the copy delivered *four days exclusive* before the end of the term, the defendant may imparle until the next term. *N. on R. E. 5 W. & M.*

Trial and judgment.

You must also proceed to trial and judgment within *three terms next after declaration* delivered, accounting that term one, *R. Hil. 26 Geo. 3.* and also charge defendant in execution, within *two terms* after *final judgment* signed, accounting that term as one, unless prevented by error or injunction. *Ibid.*

Declaration against a prisoner in custody of the marshal.

Middlesex, (fs.) A. B. complains of *C. D.* being in the custody of the marshal of the *Marshallsea* of our lord the king, before the king himself: *For that whereas.* Add pledges; you proceed as in other cases to sign judgment, if no plea, &c.

How to charge in execution in custody of marshal.

Get a rule from the clerk of the rules for the marshal to acknowledge defendant in his custody, pay

pay 5s. 6d. take same, and leave it at the marshal's house with 10s. 6d. he will write his acknowledgment thereon, which get from him, then take a piece of parchment without a stamp, in the shape of a bail piece, and enter the *committitur* thereon :

Michaelmas Term, 32 Geo. 3.

Stormont and Way.

Middlesex, to wit. *Richard Fenn* is committed to *Committitur* the custody of the marshal, &c. in execution, *piece.* at the suit of *John Denn*, in a plea of trespass on the case, for 45*l.* damages, there to remain until, &c.

R. R. attorney.

Judgment of Trin. Term,
31 Geo. 3. Roll. 566.

There is a book kept in the K. B. office called the marshal's book, in which are entered the names of persons charged in custody previously to their being so charged. But this is a book of no authority; and only meant for the marshal's convenience, that he may readily see what persons are charged in custody; so that it is (in truth and reality) only a memorial of the defendant's being charged in custody of the marshal; and not the *cause or foundation* of such charge and detainer. *Hutchins v. Kendrick. 2 Burr. 1049.* This has been adhered to in a late case before *Lord Kenyon*, and he held it not necessary on the master's certificate, and refused to discharge the prisoner for want of such entry.

Take this to the clerk of the judgments, and file it with him *before the last day of the term* in which you are to charge defendant in custody, as he must enter it on the roll, or defendant is superseable; *4 Burr. 1841. Fotherell v. Philby*, pay him 2*s.* it is usual to enter the *committitur* in the marshal's book, at the same time, before you deliver it over, pay 6*d.*

The *committitur* must be actually entered on record before the end of the second term. *2 Str. 1215. Unwin v. Kerchoffe. 4 Burr. 1841.*

A prisoner in custody at the *suit of the king*, can- If in custody at a. not be charged with *civil process*, without leave of the of King. court or one of the judges. But where the defend-
ant

If on an attachment.

ant is in custody on an attachment for non-payment of costs, and charged with a civil action also, the court consider such an attachment to be only a civil execution, and therefore held that he might be charged in execution in the action without leave of the court. *Bonafous v. Schole.* 4 Term Rep. 316.

Plaintiff must give notice of his having abandoned a former commitment, which is erroneous, before he enters a second.

Judgment obtained (and affirmed on error); execution sued for 606*l.* which was 5*l.* more than was really due: rule obtained why defendant should not be discharged, which was made absolute. Pending this rule the defendant was charged in custody for the real debt, upon which this court was moved why the commitment of defendant should not be set aside for irregularity? Held that as there was no affidavit that the plaintiff had given notice that the first commitment was abandoned, pending the former rule; and a second commitment for the same cause before the first was discharged, is clearly informal. Rule absolute. *Topping v. Ryan*, 1 Term Rep. 227.

Acknowledgment to be of the same term defendant is charged.

Court held that the acknowledgment by the marshal ought to be of the *same term* in which the defendant is charged in execution, and that an acknowledgment *two terms preceding* is not sufficient, according to the practice. *Fisher v. Stanhope.* 1 Term Rep. 464.

By Way of Detainer for a new Plaintiff.

Charging in custody of the marshal by way of detainer for a new plaintiff.

For preventing the detainer of prisoners charged by declarations in the custody of the marshal of the *Marshalsea* of this court, where the cause of action against such prisoner does not amount to 10*l.*; *It is ordered*, That no declaration, whereby any prisoner shall be charged in the custody of the marshal, shall be sufficient cause of detaining such prisoner in custody, unless an affidavit, that the plaintiff's cause of action against such prisoner does amount to 10*l.* or upwards, shall be first made and filed with the clerk of the rules of this court, and the sum specified in such affidavit shall be indorsed by him upon such declaration, before the leaving thereof with the turnkey. *R. E.* 15 Geo. 2.

File

File a bill (*if in vacation*) as of the preceding term, then make affidavit of your debt if above 10*l.* which is to be sworn before a judge (or Messrs. *Provost* and *Webb*), take a copy on treble penny stamp paper of the bill with you, and the affidavit to the clerk of the rules, he will indorse on the declaration the sum sworn to, leave the affidavit with him, pay filing, 3*s.* The bill must be filed first, then the declaration, so marked, must be delivered to the defendant, or left with the turnkey of the *King's Bench* prison, pay him 1*s.* he will acknowledge defendant in custody, then proceed as before. 2 *Burr.* 1052.

Rule to shew cause why proceedings should not be set aside for irregularity. It appeared that the defendant was in custody at the suit of same plaintiff for another cause of action. The *lat.* in this second action (which was not bailable) was returnable on the 28th of *January* 1786. On that day, the declaration was left in the office, though writ not served till eight that evening. Motion 13th *May.* *Buller J.* In *Ward* and *Wilkinson* the court refused to set aside the proceedings, though the notice of declaration was not served until half past ten at night. 2 *Burr.* 812. Besides, the defendant should have made his application sooner; he is now out of time. If a prisoner be entitled to be superseded, he must always apply for that purpose; but if he come on a mere irregularity, he is in the same situation with any other defendant. *N. B.* The declaration need not be delivered to the defendant *personally*, or to the gaoler, *unless* where he is in custody *at the suit of the same plaintiff*, for the same cause of action; so determined in this case. *Robertson v. Douglas*, 1 *Term Rep.* 191.

How to proceed.
File memorandum or warrant on a 2*s.* 6*d.* stamp with the bill.

Service of a *latitat* at eight in the evening of the return day, is good, though the declaration be left in the office in the course of the same day.

If the defendant is in custody of any gaoler, &c. For felony. for felony, upon producing your affidavit (sworn before a judge) of the debt, the judge's clerk will give you an order to detain him; in this case affidavit is filed with Messrs. *Provost* and *Webb*, and sue out writ (or if bill of *Middlesex* with Mr. *Braithwaite*)

waite) as in other cases; take the writ to the sheriff and leave the order; pay 2s. 4d.

If a prisoner in the Fleet be charged with declaration, and removes to K. B. plaintiff must proceed in C. P.

If a prisoner in the *Fleet*, charged with a declaration in the *Common Pleas*, remove himself by *habeas corpus* to the custody of the *marshal*, the plaintiff must proceed to judgment in the *Common Pleas*, and then may carry him back by *habeas corpus ad satisfaciendum* to charge him in execution. *N. on R. T. 2 Geo. 1.*

The same in this court.

And so likewise if a prisoner in custody of the *marshal* be charged with a declaration in this court, and he removes himself to the *Fleet*, the plaintiff may proceed to judgment in this court, and the defendant must be brought back by *ha. corp. ad satisf.* to be charged in execution: the number of the judgment roll must be indorsed on the *habeas corpus ad satisfaciendum*. *Ibid.*

If defendant in custody on a C. P. process be committed to the K. B. before declaration, how to proceed.

If a defendant in custody on a *common pleas process* be committed by this court, or a judge of this court, to the *King's Bench prison* before declaration delivered, the plaintiff cannot declare against him in the *Common Pleas* without removing him to the prison of that court by *ha. corp. ad respondendum*, but he may declare against him in this court; and for default of declaring in due time, this court may discharge him out of custody. *N. B. A bill must be filed before declaration delivered*, if proceedings are by bill. *Cromp. 2 V. 18.*

How to proceed by Original against the Defendant in Custody of the Sheriff of any County.

If defendant is in custody of any sheriff, &c. upon a *special capias*, then you declare against him by delivering a declaration only, on treble penny stamp paper, thus:

Declaration.

Surry, to wit, *Richard Fenn*, late of, &c. yeoman, was attached to answer *John Denn* in a plea of trespass on the case, and whereupon the said *John Denn* by J. J. his attorney complains, *That whereas* (as in other cases); you do not alledge by original,

original, in whose custody he is; but affidavit of the service is required, and you proceed the same as by bill afterwards.

If in custody of the marshal declare against him in the same manner, and do not alledge him to be in the custody of the marshal. If in custody of the marshal.

Having shewn how prisoners are to be declared against and detained, it will now be requisite to shew when they are to appear and plead.

Within what Time Prisoners have to plead in County Gaols.

That upon every arrest and mesne process returnable the first day of *Easter* or *Michaelmas* term, and a copy of the declaration be delivered before *menssem Paschæ*, or *crastinum Animarum*, and affidavit of the delivery thereof made and filed, the defendant doth not appear before the end of ten days after *Easter* and *Michaelmas* terms respectively, judgment may be entered against him, rules having been given: But if he appears before the end of ten days after the term, he shall imparle until the next term unless the action be in *London* or *Middlesex*, and defendant be in prison within forty miles of *London* or *Westminster*; then though he doth appear before the expiration of ten days after the end of the term, he shall plead two days before the *essoign* day of the next term, and in default thereof, rules having been given, judgment may be entered against him as aforesaid. If declaration be delivered before one month of *Easter*, or the morrow of *All Souls*, defendant to appear in ten days after term.

R. E. 5 W. & M. sect. 3. If he appear, may imparle till next term, except in *London* or *Middlesex*, &c.

If a copy of a declaration be delivered against such defendant on or after *menssem Paschæ* in *Easter* term, or *crastinum Animarum* in *Michaelmas* term, or in *Hilary* or *Trinity* term, and thereupon the plaintiff gives rules to appear and answer; then if the defendant appear two days before the *essoign* day of the next term, he shall imparle until the said next term; but if he does not appear within that time, judgment may be signed. *Ibid. sect. 4.* But if declaration delivered one month after *Easter*, or the morrow of *All Souls*, or in *Hilary* or *Trinity* term, if defendant appears two days before the *essoign* day; &c.

If declaration delivered before the *essoign* day of the next term after the return of the writ.

If a writ be returnable in any term, and a copy of the declaration has been delivered before the *essoign* day of the next term, the plaintiff in such next term may give rules to appear and answer, and if the defendant does not appear and plead upon the expiration of the rules, judgment shall be given against him. *Ibid. sect. 5.*

New rule.

If defendant is in custody of the sheriff, a rule to appear and plead must not be given *before affidavit of the delivery of the declaration is filed*; which must now be filed with the clerk of the rules before the *first day of the next term, after the delivery.* Rule H. 26 Geo. 3.

Construction.

If the writ be returnable before the last return of the term, and party arrested and in custody, and the declaration is delivered against a prisoner in custody of the sheriff *four days* before the end of that term, he shall appear and plead in eight days, provided the affidavit is filed in due time after delivery, and rule given.

But if not, he has till two days before the *essoign* day of the next term to appear and plead thereto; and in case of neglect to sign the judgment (a demand of plea having been made, if in custody of the marshal) that term, then a common four day rule to plead may be given the next term, and no plea being filed or delivered, plaintiff may sign judgment (*without a new demand*).

May, before final judgment, put in bail.

A prisoner may, any time pending the action, and before final judgment, file special bail, and justify same, and have a *superfedeas*, if in the custody of the sheriff; if in custody of the marshal, by a judge's order only.

N. B. A justification in *vacation* before a judge, is sufficient upon notice.

If he pleads in person, does not pay for the issue, *aliter* it by attorney.

If a prisoner plead in person, he does not pay for the issue, otherwise by attorney, nor must you deliver the issue to the attorney, if he plead in person.

The

The court held a defendant prisoner, although supersedable, but not actually superseded, if found in custody, may be charged with a declaration at the suit of a new plaintiff. 2 Burr. 1048. *Hutchins v. Kenrick*. Though a prisoner is supersedable, yet he may be charged with a declaration.

A prisoner in a county gaol sometimes enters Caveat, the general issue the same term declaration is delivered, before a rule to plead be given, so as to trick the plaintiff of the assizes; therefore be careful to search for such plea, or you cannot proceed to final judgment within three terms.

When Prisoners entitled to be discharged.

The old rule that a prisoner who is once supersedable always continues so, was insisted on; *per Cur.* It extends only to the same process; and where the nature of the charge is altered to a charge in execution, it is quite otherwise. *The Lond. Ass. Comp. v. Perkins*, 1 Term Rep. 591. Once supersedable, always so, it extends to same process.

Motion for a *supersedeas* for not proceeding to trial or judgment in due time. The arrest was in August 1783, by the sheriff of Kent; 20th November declaration delivered; 3d February 1784 no plea, plaintiff signed interlocutory judgment "without a demand of plea;" on the 26th February a plea was filed, defendant having removed himself to the K. B.; 15th July plaintiff waived the judgment (there being a dispute respecting the regularity), and gave notice of trial; in Michaelmas term following, plaintiff signed judgment, and the day after, charged defendant in execution. Palmer shewed cause, and contended a demand of plea was unnecessary (except when the defendant was in court); and if entitled to be superseded, he ought to have applied in time. Buller J. In the case of a prisoner in this court there must be a demand of plea. If he is in the custody of the sheriff, no demand is necessary. If a prisoner be supersedable for any irregularity, as for want of the demand of a plea, he cannot take advantage of that, after he is charged in execution, supposing he has

If a prisoner is once supersedable, and does not take the advantage, he cannot do it after charged in execution.

any opportunity of applying on that ground, before he is charged in execution. Now here the defendant had ample time; for judgment was signed in *Michaelmas* term 1784, and he might have applied in *Trinity* term following. Rule discharged. *Rose v. Christfield.* 1 Term Rep. 591.

For want of a declaration within two terms, defendant may be discharged.

That if no declaration be delivered before the end of the next term after the return of the process, by virtue whereof the prisoner is or shall be taken, &c. and an affidavit made and filed with the clerk of the rules of the delivery, and of the time when, and the person to whom the same was delivered before the first day of the next term after the delivery of such declaration, the prisoner to be discharged by *superfedeas*, &c. *R. Hil. T. 26 Geo. 3.*

In case of commitment to the marshal.

In case of commitment or surrender to the marshal after return of process, and before declaration delivered, unless the plaintiff shall cause a declaration to be delivered before the end of the term next after such commitment or surrender shall be made, and due notice of such surrender given, the prisoner shall be discharged by writ of *superfedeas*. *Ibid.*

How to discharge for want of Declaration.

How to discharge prisoner for want of declaring in a county gaol.

To discharge a prisoner on the plaintiff's not declaring, if in custody of the sheriff, &c. get a certificate from the gaoler of the causes he is charged with, and an affidavit of his having signed same; then take out a summons from a judge, to shew cause why a writ of *superfedeas* should not issue to discharge the defendant; serve same on plaintiff's attorney, and if he does not attend, make affidavit of such service and attendance thereon (*as there is but one summons necessary*), and then the judge will grant an order for a *superfedeas*, upon filing common bail; pay summons in term 1s. vacation 2s. order 4s. common bail 1s. 6d. *superfedeas* signing 1s. 8d. seal 7d.

How

How if in Custody of Marshal.

If the defendant is in the custody of the marshal, If in custody of the marshal. apply to the clerk of the papers of the *King's Bench* prison, for a copy of the causes whereon he stands charged, then take out summons as before, and serve it on plaintiff's attorney; if he does not attend, an order will be made, upon filing common bail, and the marshal (*upon the clerk of the common bail's certificate*) will discharge the defendant without a *superfedeas*; pay for it 1s.

If the action be by original, then proceed as If by original. above, and when you have got the order, file an appearance with Mr. *Adams* the filacer, pay 2s. 6d. and he will make out a *superfedeas* thereon, pay 3s. 10d. signing, seal 7d. if in custody of the sheriff; if in custody of the marshal, he will certify to him, the same as by bill; pay him for certificate 1s.

If the defendant be superseded for want of proceedings before judgment, yet the plaintiff may, If a *superfedeas* be had before judgment, yet plaintiff may have execution; aliter for want of charging in execution. after judgment obtained, take him in execution; but otherwise, if defendant supersede for want of charging in execution. *N. on R. T. 2 Geo. 1.*

How for want of proceeding to Trial, &c.

Counsel's hand not being set to a replication, Mr. *J. Buller* discharged the prisoner; counsel's hand in this case was requisite.

That in all cases after a declaration delivered as When entitled for want of proceeding to trial or judgment, aforesaid at the *King's Bench*, or any other gaol or prison, unless the plaintiff shall proceed to trial, or final judgment thereupon, within *three terms next after such declaration delivered* (if by the course of this court the plaintiff can so proceed), of which *three terms*, the term wherein such declaration shall be delivered shall be taken to be one: or in case of a In case of a surrender within three terms, prisoner shall be final discharged. surrender in discharge of bail, after a declaration delivered, unless the plaintiff shall proceed to trial or final

final judgment thereupon, *within three terms next after such surrender and due notice thereof* (if by the course of the court the plaintiff can so proceed); of which three terms, the term wherein such surrender shall be made shall be taken to be one, the prisoner shall be discharged out of custody by writ of *superfedeas*, to be granted by this court or one of the judges upon filing common bail, unless upon notice given to the plaintiff's attorney, good cause shall be shewn to the contrary. And in all cases

After trial had, to be charged in execution in two terms after trial or final judgment, in case no writ of error or injunction.

after such trial shall be had, or final judgment obtained against any prisoner in the custody of the marshal, or in any other gaol or prison, unless the plaintiff shall cause such prisoner to be charged in execution *within two terms next after such trial shall be had, or final judgment shall be obtained* (of which two terms, the term in which such trial shall be had, or final judgment shall be obtained, shall be taken to be one), in case no writ of error shall be depending, nor injunction be obtained for stay of proceedings:

If any writ of error or injunction, then within two terms after affirmance, &c. or injunction, dissolved.

And if any writ of error shall be depending, or injunction obtained, then *within two terms next after judgment shall be affirmed*, the writ of error be nonprossed or discontinued, or the injunction dissolved, including the term in which such affirmance of judgment, nonpros, or discontinuance of the writ of error, or dissolution of the injunction, shall be obtained; or in case of a surrender in discharge of bail *after trial had, or final judgment obtained*, unless the plaintiff shall cause the defendant to be charged in execution *within two terms next after such surrender and due notice thereof*; of which two terms, the term wherein such surrender shall be made shall be taken to be one, in case no writ of error shall be depending, nor injunction obtained for stay of proceedings; and if any writ of error shall be depending, or injunction obtained, then *within two terms next after judgment shall be affirmed*, the writ of error be nonprossed or discontinued, or the injunction dissolved, including the term in which such affirmance of judgment, nonpros, or

In case of surrender after trial had, or final judgment to be charged in execution in two terms next after surrender and notice.

If error or injunction, then within two terms next after judgment or affirmance.

discon-

discontinuance of the writ of error or dissolution of injunction, shall be obtained, and the prisoner shall be discharged out of custody by *superseas* to be granted as aforesaid, on filing common bail; unless upon notice given to the plaintiff's attorney, good cause shall be shewn in either of these cases to the contrary. *R. H. T. 26 Geo. 3.* The rule of *Trin. 2 Geo. 1.* is now at an end.

For the better understanding of this rule, it may be proper to state the proceedings. If the declaration is delivered in *Hilary* term 1791, the plaintiff must sign final judgment the last day of *Trinity* term, and charge defendant in execution the last day of *Michaelmas* term (unless error or injunction).

If a writ be sued out against husband and wife, and the wife only be arrested and detained in custody, she shall not be compelled to put in bail for her husband, but may file common bail for herself, and have a *superseas* for her discharge; but if the husband only be arrested, he shall put in bail for his wife, as well as himself.

If a defendant has been once discharged out of execution upon terms which are not afterwards complied with, the plaintiff cannot resort to the judgment again, or charge the defendant's person in execution. *Vigers v. Aldrich, 4 Burr. 2482.*

Where a prisoner in execution is discharged by the consent of his creditor, upon giving a fresh security to satisfy the judgment, and that security is afterwards defeated on account of mere informality, the judgment is satisfied, and cannot be set off against a demand of the prisoner. *Jacques v. Withy, 1 Term Rep. 557.*

How for not proceeding to Judgment, charging in Execution in Custody of the Sheriff.

To proceed to discharge the prisoner for not proceeding to judgment, or charging in execution in due time, apply, if the defendant is in custody of the sheriff, to the gaoler for a copy of causes; get an affidavit

Explanation of the rule.

If writ be against husband and wife and wife in custody, she shall not put in bail for her husband.

Once discharged cannot be taken again.

Nor if he takes a new security, if it becomes bad by the act of the plaintiff.

How to discharge defendant for not proceeding to judgment and execution, in custody of the sheriff.

fidavit of his having signed the same, and that the name thereto is his hand-writing; then take out a summons at a judge's chambers to shew cause, which serve on the plaintiff's attorney. If he does not attend, you will upon the third summons have an order of course, on an affidavit of the service and due attendance; but if he should attend, and it is a country cause at a distance, the first is an order *nisi*, within a limited time; giving time to the agent to write to his client, and then an order absolute, if no cause shewn; the agents in town generally indorse the summons, unless cause shewn in a week, &c.

Upon the order in either case being made, you issue out a writ of *superfedeas* for his discharge; which see hereafter.

On filing common bail with the judge's clerk in this case, you file a memorandum or warrant on a 2s. 6d. stamp, as directed by *stat. 25 Geo. 3. c. 80.*

As to where a writ of error brought.

If the plaintiff recover a judgment against two defendants in the *King's Bench*, and one of them bring error in the *Exchequer Chamber*, the plaintiff cannot charge the other defendant in execution till the record be remitted into the court of *K. B.* notwithstanding the writ of error might have been quashed immediately, because not brought by both the defendants. *Laroche v. Wasbrough & an. 2 Term Rep. 737.*

Court permitted an alteration in the committitur piece, although filed.

In such case where the judgment was affirmed in the *Exchequer Chamber*, and costs given of the writ of error, and both defendants were taken under writ of execution on the whole sum including the costs of the writ of error as well as the original sum recovered, this court permitted the plaintiff to amend his committitur in execution as to the defendant who did not join in the writ of error, by altering it to the original sum recovered. *Ibid.*

In Custody of the Marshal.

In custody of the marshal.

If the defendant be in custody of the marshal, then get copy of the causes from the clerk of the papers of the

the

the *King's Bench* prison (no affidavit is necessary of his signing), take out summons as before, and attend; if you obtain an order, file bail with the clerk of the common bails if by bill (if by original, enter appearance with Mr. *Adams*), who will give certificate for a discharge on bail being filed: if by original, Mr. *Adams* signs it.

A. B. plaintiff,

and

In the *King's Bench*,

C. D. defendant.

J. C. of, &c. gent. maketh oath and saith, That he did, on the day of last past, serve a true copy of the summons hereto annexed, on Mr. *H. I.* who acts as attorney or agent for the plaintiff in this cause, by leaving the same at the house of the said *H. I.* in with the clerk or servant there. And this deponent further saith, That he did also serve Mr. *H. I.* with another true copy of the summons hereto annexed, on the day of last, by leaving the same with the clerk or servant of the said *H. I.* at his house aforesaid. And this deponent did also, on the day of last, personally serve the said *H. I.* with a true copy of the summons hereto annexed. And this deponent further saith, That he did, on the several days mentioned in the said summons, duly attend at the chambers of the right honourable *Lloyd lord Kenyon*, in *Serjeant's Inn, Chancery-lane, London*, but no one attended on behalf of the said plaintiff.

Affidavit of service of the summons.

Honourable Mr. Justice Buller.

It is very common to save this affidavit and the three summonses, by getting plaintiff's attorney to go to the chambers; and the clerk will make an order upon hearing. If it is a country cause, the order will be *nisi*, unless cause is shewn in a week.

May get plaintiff's attorney to consent.

It is improper to take a cognovit from a prisoner without his attorney being present, and if done, the proceedings may on that ground, be set aside, but not for irregularity. *Parkinson v. Caines.* 3 Term Rep. 616.

Attorney should be present on prisoner's signing a cognovit.

The

Hab. corp.
brought by plain-
tiff to remove
his prisoner,
quashed.

The plaintiff arrested defendant in the *Marshalsea* court, and had him in custody there; the plaintiff brought a *habeas corpus* to remove him into the K. B. to charge him with the same demand. Motion to quash the writ made absolute. *Melfome v. Gardner*, Cow. Rep. 116.

Writs of Superseas.

This writ is a command to stay or forbear some ordinary proceedings in law, which in appearance, ought to be done, or pursued, were it not for the cause whereon it is granted.

Superseas for
not declaring.

George the third, &c. to the Sheriff of Kent, greeting: Whereas it was lately commanded that you should take *Richard Fenn*, if he might be found in your bailiwick, and keep him safely, so that you might have his body before us at *Westminster*, on *Wednesday* next after fifteen days of *Easter*, to answer to *John Denn*, in a plea of trespass, and also to a bill of the said *John*, to be exhibited against the said *Richard*, for 100*l.* upon promises, according, &c. and because the said *Richard* came into our court before us, and hath filed common bail in the said action, and the said *John* not having declared against him ~~within two terms next after the said~~ taking; therefore we command you, that you wholly cease from taking, arresting, or imprisoning, the said *Richard*, or any ways molesting him on that occasion, and no other; and if you have taken him on that account, and no other, and do detain him, that then you cause him to be delivered without delay, from the prison wherein he is so detained, at your peril. Witness *Lloyd* lord *Kenyon*, at *Westminster*, the thirteenth day of *July*, in the thirty-first year of our reign.

Stormont and Way.

Præcipe.

Kent, (s.) Superseas for *Richard Fenn*, ats.
John Denn.

I. G. attorney.

Pay signing with Messrs. *Provost and Webb* 1s. 8d. seal 7d. Sheriff's fee in *London and Middlesex* 2s. 4d.

The above *superfedeas* will do by original, only By original, go as far as a plea of trespass, and add, "*on the case on promises to the said A. his damage of fifty pounds; and because the said Richard came into our court before us, and appeared in the said action, and the said A. not having declared, &c.*" as above. Pay signing with Mr. *Adams* the filacer, 3s. 10d. seal 7d. and put his name, instead of *Stormont and Way*.

George the third, &c. to the Sheriff of *Oxfordshire*, The like for not proceeding to trial and judgment. greeting: *Whereas A. B.* is detained in our prison under your custody, by virtue of a certain writ of *latitat*, returnable on, &c. to answer *C. D.* in a plea of trespass, and also to a bill of, &c. And whereas the said *A.* afterwards, in *Hilary* term last past, was charged with a declaration at the suit of the said *C.* in the plea aforesaid; but because it appears to us that the said *A.* hath filed common bail to answer the said *C.* in the plea aforesaid, and that the said *C.* hath not proceeded to judgment against the said *A.* within *three terms* next after the delivery of the said declaration, as required by the rules of our said court; we command you that you wholly cease from taking, &c. *as in the other.*

George, &c. as in the other, as far as "*plea aforesaid*," then say, "and because the said *C.* hath not On not charging defendant in execution. proceeded to charge the said *A.* in execution, *within two terms* next after judgment obtained, according to the rules of our said court, before us, we therefore command you, that you wholly cease (as in the other)."

Say (after recital of the writ), and because it On putting in good bail. sufficiently appears to our said court before us, that the said *C.* hath found sufficient bail, to answer the said *A.* in the plea aforesaid; therefore we command you, that if the said *C.* is detained in our said prison in your custody, by occasion of the said action, and no other, then you permit him to go at large,

large, as you will answer the contrary at your peril.
Witness, &c.

Debtors in Execution.

*How to be discharged on the 32 Geo. 2.
c. 28. & 26 Geo. 3. c. 44.*

Debtor charged
in execution for
any sum not ex-
ceeding 100*l.*
&c. may ex-
hibit a petition
to the court.

Certifying there,
the causes of
his imprison-
ment, with a
schedule of his
real and personal
estate, at the
time of his first
imprisonment.

Fourteen days
previous notice
of such intended
petition to be
given to the cre-

IF any person shall be charged in execution for any sum not exceeding 100*l.* and minded to deliver up to the plaintiff all his estate, he may, before the end of the first term which shall be next after he shall be charged in execution, exhibit a petition to any court from whence the process issued, upon which any such prisoner was or were taken and charged in execution as aforesaid, or into the court, or where he is removed by *habeas corpus*, setting forth not only a true account of his real and personal estate, which he, or any in trust for him, is, was, or were entitled to, at the time of his petitioning; and of all incumbrances affecting same, but also a true account of all the real and personal estate which he, or any person in trust for him, or for his use, was or were interested in, or entitled to, at the time of his first imprisonment, either in possession, reversion, remainder, or expectancy, to the best of his belief; and the sureties, bonds, notes, and books, relating thereto, with the names, and places of abode of the witnesses. And before it be received, such prisoner shall give or leave, or cause, &c. unto and for all and every the creditors at whose suit he shall stand charged in execution, or his or her executors, &c. at his or their usual place of abode, or to or for his attorney or agent last employed in any such action, in case any such creditor cannot be met with, but not otherwise, 14 days at least before any such petition shall be presented and received, a notice in writing, signed with the proper name, or mark of such prisoner, importing therein, "That such prisoner doth intend

to petition the court as aforesaid. And also setting forth a true copy of the account or schedule, including the whole real and personal estate which he doth intend to deliver (other than and except the necessary wearing apparel and bedding of the prisoner, and his, her, or their family, and the tools or instruments of his trade or calling, not exceeding 10l. in the whole)."

Affidavit of service to be left with petition, and read; and a rule to be made for bringing the prisoner into court, and summoning the creditor to appear personally, or by attorney, at some certain day to be specified; and the creditor appearing or not in person, or by attorney, then upon affidavit of the due service thereof being made on him, or his attorney, if any such creditor, his, her, or their executors, &c. cannot be met with, such court shall examine into the matter, and order an assignment of his effects.

But if the creditor shew cause, and desire further time, the court is to remand the prisoner, and the creditor not appearing, he may be discharged, unless the creditor covenant to allow him 2s. 4d. per week. But upon failure of payment, the prisoner, on application, to be discharged, &c. Where more creditors than one insist on the prisoner's detention, they are to pay him each not exceeding 1s. 6d. *Sec. 14.*

Prisoners charged in execution in country and other gaols, to proceed in like manner. *Sec. 15.*

This act is extended to 2004. by stat. 26 Geo. 3. c. 44. and the prisoner is to deliver up his estate and effects as by the former act.

A prisoner in custody on an attachment for non-payment of money awarded pursuant to the rule of court on bonds, and likewise for costs taxed, and also on an *excommunicato capiendo*, or other process for costs in the ecclesiastical court, to be discharged, *f. 3.* and gaolers to give notice of this act, under penalty of 50l. *f. 4.*

Where any debtor shall have neglected to take the benefit of the former act, and remained in prison one year, and shall make it appear to the court that

ditior, or his attorney, with a copy of the schedule.

Affidavit of the service of such notice to be delivered with the petition; and a rule to be made, &c.

Oath being made of the service of the rule, the court to examine.

Creditor disbelieving the oath, &c.

Prisoners charged in execution in the country.

If by neglect prisoner did not petition, &c.

of J. B. Esquire, Sheriff of the county of Berks, at the suit of J. D. or any person or persons in trust for me, was or were possessed of, or entitled unto, at the time of my first imprisonment, at the suit of the said J. D. or at any time since, either in possession, reversion, remainder, or expectancy, other than and except the necessary wearing apparel and bedding of or for me and my family, and the tools or instruments of my trade or calling, not exceeding 10l. in value in the whole; as witness my hand this day of 1791. F. R. Real estate.—I have none, either in possession, reversion, remainder, or otherwise.

Goods.—One old chair; six pewter plates.

Debts.—J. W. of Oxford, labourer, £. 2 0 0

Witness J. G.

R. F.

N. B. The notice, petition, schedule, and affidavits, are now printed, and may be had at the clerk of the rules, which will save a great deal of trouble.

To the Right Honourable Lloyd lord Kenyon, Lord Chief Justice of his Majesty's Court of King's Bench, at Westminster, and the rest of the Justices of the same Court.

The humble Petition of Richard Fenn,

Sheweth,

THAT your petitioner is a prisoner in his majesty's gaol in and for the county of Berks, in execution at the suit of John Denn, for the sum of 40l. debt, and 63s. damages, as by the certificate annexed, more fully appears.

That your petitioner humbly apprehends he is entitled to the benefit of an act of parliament, made and passed in the 32d year of the reign of his late majesty, king George the second, entitled, *An act for the relief of debtors, with respect to the imprisonment of their persons, &c.* and also of an act made and passed in the 26th year of the reign of his present majesty,

majesty, entitled, *An act for the further relief of debtors, &c.*

That your petitioner hath not at the time of exhibiting this his petition, nor had he at the time of his imprisonment in this action, or at any time since, any debts, estates, or effects whatsoever, either in reversion, remainder, or expectancy, other than and except ^a (what is mentioned and contained in the schedule or inventory hereunto annexed) the necessary wearing apparel and bedding for himself and family, and the tools or instruments of his trade and calling, not exceeding the sum of ten pounds in value in the whole.

^a If a schedule.

Your petitioner being willing and desirous to conform himself to the direction of the said several acts, most humbly prays your lordships, to grant a rule or order of this honourable court, for the plaintiff to shew cause why he should not be discharged pursuant to the said acts, and as in duty bound, your petitioner will ever pray, &c. *R. F.*

N. B. This petition will serve for a prisoner in a county gaol, as well as in custody of the marshal.

Affidavit to be annexed.
Put the title of the cause.

J. G. of, &c. gentleman, maketh oath and saith, That he was present, and did see *R. F.* the above-named defendant sign his name, or mark, to the notice and schedule hereunto annexed, on the day of the date thereof, and also to a copy of the same; and that the name *J. G.* subscribed as a witness thereto is of the proper hand writing of this deponent.

Affidavit of service of the notice and schedule.

A. B. of, &c. maketh oath and saith, that he this deponent did, on the day of instant, serve the above-named plaintiff *A. B.* with a true copy of the notice (and schedule hereunto annexed), by delivering the same to *E.* the wife of the said *A. B.* at his dwelling house, or place of abode, situate in in the county of .

If it is a country cause, or the defendant be in custody of any other gaoler (except the marshal), then there must be an affidavit of seeing the gaoler sign the certificate, which will be as follows, (and the

the affidavit of service of the rule, as well as that of seeing the gaoler's certificate signed, may be included in one affidavit):

J. F. of, &c. maketh oath and saith, That he did see *A. D.* the keeper of his majesty's gaol or prison of, &c. sign the certificate hereto annexed, and that the name *A. D.* set and subscribed at the foot of the said certificate is of the proper hand-writing of the said *A. D.*

Affidavit of seeing the gaoler sign.

The petition and affidavit are to be engrossed on paper *without a stamp*, and to be sworn in town before a judge (pay nothing); in the country to be sworn before a commissioner: annex also a copy of the cause from the gaoler (if in custody of the marshal, the clerk of the paper certifies). After affidavit sworn, leave it at the clerk of the rules, who will give you a rule to bring up the defendant, and for the plaintiff to appear, pay 2s. 6d.; serve a copy on the plaintiff, and also on the gaoler, of which make affidavit on plain paper; annex the rule to the affidavit*. You may have printed forms of the petition, notice, and affidavit, at the clerk of the rules office.

How to proceed.

* If at the assizes, the affidavit is produced there of the service of the rule.

It seems the plaintiff (or his attorney, if the plaintiff is not to be met with) is to be served personally with the notice or rule.

Plaintiff's attorney appeared, and offered to sign a note for 2s. 6d. per week, to be allowed defendant in order to continue him in prison in execution at the plaintiff's suit: held not sufficient.

Plaintiff's attorney cannot sign a note.

All *objections* as to the *insufficiency* of a prisoner's *schedule* of his effects in point of *form*, are to be made *on the first attendance*: the second time the prisoner is brought up, the plaintiff must be prepared to falsify the account given by defendant of his effects, if he can; if not, he will be discharged.

Objections to the schedule in point of form, to be made the first time.

The groats must be made payable, and be paid every *Monday*, whatever may be the day on which the defendant is brought up to be discharged, and

Groats must be made payable on every Monday.

is remanded at the instance of the plaintiff. *Daughl. Rep.* 68. *Lench v. Pargiter.*

And a judge's order made after term for his discharge is final. *Ibid.* Court said in future let all the notes be made payable on the *Monday. Ibid.* 69.

C. D. } I hereby promise to pay and allow to
v. } A. B. 2s. 4d. per week, weekly on *Mon-*
A. B. } day in every week, for so long time as he
shall continue in prison, in execution at my suit, as
witness my hand this 13th day of *July 1791.* C. D.
Witness, J. G.

If the plaintiff
cannot attend.

If the plaintiff cannot attend he may sign it, and his attorney may make affidavit of his having signed it in his presence, and his witnessing the same, and if delivered at the time of his discharge, it will do. But it must be delivered in court.

The note may be had at the clerk of the rules office ready printed on a 6d. stamp.

Fourteen days
notice given, both
days inclusive.

Prisoner dis-
charged upon
circumstances.

The prisoner had given notice in a former term, to be discharged pursuant to this act above fourteen days, but nothing being done therein, by reason that he had not annexed a schedule in the requisite form to the notice (though he had in reality no effects); upon this discovery he gave a new notice, having then only thirteen days remaining, unless the first and last were both included: question was, whether he should be discharged? Mr. Justice Yates observed, that upon returns to writs of *mandamus* and *sci. fac.* the rule was, that there must be fifteen days between the teste and return, and yet in practice there were only fourteen days, one of the first or last always being included; so upon a *superfedeas* for want of declaring before the end of two terms, one of the two is always included. By analogy therefore to these instances, he thought the court might, in favor of liberty, make the computation in the present case, so as to include one of the days: he chose however to lay hold of the circumstances of the first notice, and said there was no surprise on the plaintiff, nor any intention of surprising him, though

though he acknowledged, that, strictly speaking, two insufficient notices could not amount to one good one. Mr. Justice Willes coming into the same sentiment, and plaintiff's attorney not disputing it, the prisoner was discharged. 4 Burr. 2525. *Morley v. Vaughan*.

Defendant taken in execution on a *ca. sa.* returnable first return of Michaelmas term, sued out Trin. vacation 1790: he escaped from the officer and was retaken 20th November, and carried to the Marshalsea prison. In Hilary Term 31 Geo. 3. he applied to be brought up under the lords act before Mr. J. Buller at his chambers, for the purpose of obtaining his discharge, but as there was a mistake in the notice, as to the name of the cause, he was remanded. Motion in Trinity term 31 Geo. 3. that he might be brought up. The court thought the application was made in time, for that the defendant could not be said to be charged in execution, until he was actually delivered over to the marshal: and that 26 Geo. 3. which was made in *pari materia*, contained a parliamentary exposition of the words "charged in execution," in the lords act, for it directs all gaolers and keepers of prisons, to give notice of that act to all persons in their custody for debt, within three days after such person shall have been committed or charged in execution. They therefore ordered the defendant to be brought up, and recommended him to amend the title to the notice. *Vaughan v. Durnell*. 4 Term Rep. 367.

Although a prisoner escape in execution, and be re-taken, yet he may take the benefit of one of the acts.

If a person who has been discharged by an insolvent act, brings an action and recovers on a promissory note made to him before his imprisonment, but not due till after his discharge, and which was not inserted in his schedule, he shall hold the money as a trustee for his assignees. *Dougl. Rep.* 472. *Brown v. Rivers*.

If he brings an action after his discharge, shall hold money as a trustee only.

A general judgment signed by virtue of a warrant of attorney given before the passing of an insolvent act, of which the defendant is entitled to take advantage by pleading in discharge of his per-

A general judgment by warrant of attorney, will not warrant a special execution under 12 Geo. 3. c. 23.

son, &c. will not warrant a special execution under the act of 12 Geo. 3. c. 23. But the court will give the plaintiff leave to plead the insolvent act for the defendant, and sign a special judgment under it, for the warrant of attorney will preclude the defendant from saying there is no debt. *Buxton v. Mardin*, 1 Term Rep. 80.

Proceedings by Habeas Corpus.

Habeas corpus.

THERE are several writs of *habeas corpus*, to which the subject is entitled by common right, when he is deprived of his liberty. But the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*, directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, & recipiendum*, to do, submit to, and receive, whatsoever the judge or court awarding such writ, shall consider in that behalf.

No *habeas corpus* lies for an enemy, prisoner of war, however ill used or deceived. 2 Black. Rep. 1324.

Delays made originally in issuing and returning this writ.

Great delays were made in granting this writ, because the judges pretended to have power either to grant or deny it, not only that, but the party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and third, called an *alias* and *pluries*, were issued, before he produced the party; which oppression gave birth to the famous *habeas corpus* act, 31 Car. 2. c. 2.; which is frequently considered as another *magna charta* of the kingdom; and by consequence has also, in subsequent times, reduced the method of proceeding on these writs (though not within the reach of the statute, but issuing merely at the common law) to the true standard of law and liberty. 3 Black. Com. 135.

How

How to remove the Body from the Custody of the Sheriff to the K. B. Prison.

If the defendant be detained on a writ issued out of this court, and wishes to receive the benefit of it (*which is both airy and wholesome*), he may, by getting a creditor to make affidavit of a debt of 10*l.* or upwards in this court, issue out a writ thereon, and bring a *habeas corpus ad faciendum & recipiendum*, which is commonly called a *habeas corpus cum causa*, because it commands the sheriff, or persons in whose custody he is, to bring him before the chief justice therein named, or in his absence, any other justice of the same court, together with the day and cause of his caption and detainer, to do and receive whatsoever shall be considered of him in that behalf, directed to the sheriff in whose custody the prisoner is, which writ is signed and sealed as directed on the other side, and left afterwards with the sheriff for his return; when done, he brings up the defendant to a judge's chambers, who commits him to the custody of the marshal.

This writ in the fifth year of Charles II. could not be made returnable immediately, or in the vacation, unless the party was in prison in London or Middlesex, or in order to deliver him over in discharge of his bail; but since the statute of 4 & 5 W. & M. c. 21. which gave liberty to a plaintiff (instead of bringing his prisoner to this court at the great expence of the writ of *habeas corpus ad respondendum*), to charge him with a declaration in prison; it has been determined, that in all civil suits, this writ may be had returnable immediately, before a judge at his chambers, and may now be sued out, without any previous motion made. *Vide 3 Burr. 1876.* And that the sheriff not obeying it, &c. will be subject to a penalty, and an attachment for his contempt. *2 Burr. 854.*

There is also another writ of *habeas corpus*, called an *habeas corpus ad respondendum*, when a man hath cause of action against one who is confined by the process of some inferior court, and he would sue

How to proceed to remove from a gaol or spunging-house, either on a writ issuing out of this court, or an inferior court.

Formerly this writ could not be returnable immediately unless, &c. but now may.

Attachment.

Ha. corp. ad respond.

that prisoner in this court : In this case he may have this writ, to remove the prisoner into this court, returnable *at a day certain*, to answer his action here. And if the action be bailable, an affidavit of the debt must be made and filed on suing it out with Messrs. *Provost and Webb*, and there must be an *ac-etiam* in the writ, same as inserted in common process. The form of such writ is in *Lilly's Entries*, 595. It seems this writ cannot be had where the prisoner is in custody of the marshal. *Lilly's Pract. Reg.* 2 V. 4. Both *Lilly* and *Style* say it may be had if the prisoner be in the *Fleet* to charge him in the *King's Bench*, with the new action. But 2 *Burr.* 1049. says the contrary, that it may be issued in vacation, returnable the first day of the next term, to charge in this court. *N. B.* This is only necessary where the cause of action accrues in the vacation ; if it accrues previous, you may charge him with a declaration.

How to remove the Body from the Custody of the Sheriff, on a Common Pleas Writ, to the King's Bench Prison, or from an inferior Jurisdiction, &c.

If defendant be detained on a writ from *Common Pleas*.

If the defendant be detained on a writ out of the *Common Pleas*, and wishes to go to the *King's Bench Prison*, he must first obtain a writ out of this court for 10*l.* or upwards, against him at the suit of a *new creditor* ; in that case, an affidavit is to be made of the debt, and a writ sued out, directed to the sheriff in whose custody he is, then issue a *habeas corpus*, which sign and seal, and leave them both at the sheriff's office for a return.

If in an inferior jurisdiction.

If he is in custody in an inferior jurisdiction, as the sheriff's court of *London*, &c. then he may bring a *habeas corpus* in the first instance, without a writ being issued out against him.

This writ cannot be had by the plaintiff to remove his own cause from an inferior court, for the same debt defendant is detained. *Melfome v. Gardener. Corp. Rep.* 116.

The

The *habeas corpus* is now printed on a 5s. stamp, How to sue it and may be had at the stationers in blank; but in case it is not to be had, I shall here insert the form thereof, which is as follows:

George, &c. to the ^a sheriffs of London, greeting: *Habeas corpus.*
We command you, that you have the body of C. D. ^a The sheriff in
detained in our prison under your custody as it is whose custody
said, under safe and secure conduct, together with defendant is,
the day and cause of his being taken and detained,
by whatsoever name he shall be called in the same,
before our right trusty and well-beloved Lloyd lord
Kenyon, our chief justice, assigned to hold pleas in
our court before us, at his chambers, situate in Ser-
jeants Inn, Chancery Lane, immediately after the re-
ceipt of this writ, to do and receive all and singular
those things, which our said chief justice shall then
and there consider of him, in this behalf, and have
there then this writ. Witness Lloyd lord Kenyon,
at Westminster, the 13th day of July, in the 31st
year of our reign.

J. K. attorney.

Stormant and Way.

London, *hab. corp.* for C. D. to do and receive *Præcept.*
ret'ble immediately. J. K.

To be signed by Messrs. *Provost* and *Webb*, pay How to proceed;
6s. 8d. in term time; vacation 7s. 8d. seal 7d. take
it to the sheriff's office in whose custody the defend-
ant is, he will make his return thereon, and make a
warrant to his officer, to take the defendant before the
chief justice, who will commit him; pay 9s. 4d. for
the first action, 2s. 4d. for every other, and 2s. 4d.
for warrant to deliver, officer 10s. 6d. judge's clerk
8s. 6d.

Though this writ is returnable before the chief Any judge may
justice, yet any other of the judges may commit commit.
the prisoner to the King's Bench in his absence.

The above form will do for all counties, only This form of the
direct it to the sheriff, &c. in whose custody the de- writ will do in
fendant is. all counties.

If you remove a person from the country, the Fees in the
sheriff is paid 1s. per mile for bringing him to town, country.

R r 4

and

and the judge will not (it is said) commit the defendant, unless the sum is paid; but the officer must obey the writ, though the prisoner refuse to pay his fees. 2 Str. 814.

Prisoners committed to remain for two days notwithstanding any other writ of *habeas corpus*.

Every prisoner who shall be committed to the custody of the marshal of this court, by virtue of any writ of *habeas corpus ad respondend.* or *ad faciend.* et *recipiend.* shall remain in actual custody of the said marshal by the space of *two days* next after such committal of such prisoner to the said marshal, notwithstanding any other writ of *habeas corpus* issuing out of any other court to the said marshal delivered and allowed. *R. H. 5 W. & M.*

Defendant in custody not to be discharged till bail perfected.

If the defendant be returned in custody on a *habeas corpus*, he is not to be discharged until he has justified his bail, which may be done any time before final judgment, and bail may for this purpose in vacation justify before a judge at his chambers.

How to remove the Cause from an inferior Court.

How to remove the cause from inferior courts.

Before we proceed to shew the mode how to remove the cause, it may be proper to state the several acts of parliament relating thereto; and first the act 21 Jac. 1. c. 23. being an act to avoid vexatious delays by the removal of frivolous causes, enacts, That where the judge of an inferior court is a barrister of three years standing, no cause shall be removed from thence by *habeas corpus* or other writ, except it be delivered before issue or demurrer joined in the said cause, so as the said issue or demurrer be not joined within six weeks next after the arrest or appearance of the defendant to such action. *Sec. 2.*

No suit shall be removed, unless writ be delivered before issue or demurrer joined.

That no cause, if once remanded to the inferior court by writ of *procedendo*, or otherwise, shall ever afterwards be again removed. *Sec. 3.*

A suit once remanded, shall never afterwards be removed. Under 5l. cannot be removed.

And that no cause shall be removed at all, if the debt or damages laid in the declaration do not amount or exceed the sum of 5l. But an expedient having been found out to elude the latter branch of the

the statute, by procuring a nominal plaintiff to bring another action for 5*l.* or upwards (and then by the course of the court the *habeas corpus* removed both actions together), it is, therefore, by statute 12 Geo. 1. c. 29. s. 3. enacted, That the inferior court may proceed in such actions as are under the value of 5*l.* notwithstanding other actions may be brought against the said defendant to a greater amount.

And in order to prevent delays being made in trying causes in inferior courts, which were frequently practised, by the stat. 43 El. c. 5. it is enacted, That such writ of *habeas corpus* shall be delivered to the judge before the jury have appeared, and one of them sworn to try the cause. *Sec. 2.*

By the 19 Geo. 3. c. 70. s. 6. it is enacted, That no cause, where the cause of action shall not amount to 10*l.* or upwards, shall be removed into any superior court, by *habeas corpus*, or otherwise, unless the defendant shall enter into recognizance for the payment of the debt and costs, in case judgment shall pass against him; as in *Sec. 5.*

By *Sec. 4.* it is enacted, That in all cases where final judgment shall be obtained in any action in any inferior court of record, it shall be lawful for any of his majesty's courts of record at *Westminster*, on affidavit made and filed therein, of such judgment being obtained, and of diligent search and inquiry having been made after the defendant, or his effects, and of execution having issued against the person, or effects, are not to be found within the jurisdiction of such inferior courts, which affidavit may be made before a judge or commissioner, and such superior courts to cause the record of the said judgment to be removed into such superior court, to issue writs of execution thereupon to the sheriff of any county, &c. against the person or effects of the defendant, in the same manner as upon judgments obtained in the said courts at *Westminster*; and the sheriff is authorised to detain the defendant until 20*s.* be paid to him, or levy the same out of the effects, according

Writ of *hab. corp.* not to be allowed after one of the jurors sworn.

No cause under 10*l.* to be removed into a superior court, unless bail be given for the debt, &c.

If judgment be obtained in the inferior court, and the defendant cannot be found, how to proceed.

according to the nature of the execution, for the extraordinary costs of the plaintiff in the inferior court, subsequent to the said judgment, and of the execution in the superior court, over and above the money for which such execution shall be issued.

Upon what conditions execution shall be stayed upon any writ of error, &c. for reverting judgment given in an inferior court, where the damages are under 10l.

That no execution shall be stayed upon any writ of error to be sued, for the reverting of judgment given in any inferior court of record, where the damages are under 10l. unless such person, with two sufficient sureties, shall first, before such stay made, be bound unto the party for whom any such judgment is given by recognizance, to be acknowledged in the same court, in double the sum adjudged, to be recovered by the said former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay (if the said judgment be affirmed, or the said writ of error be nonprossed) the debt, damages, and costs adjudged, and all costs and damages to be awarded for the same delay of execution.

Seet. 5.

Habeas corpus to remove the cause from the sheriff's court of London.
N. B. If from the mayor's court, London, then direct it to the mayor, aldermen, and sheriffs of the city of London.

George the third, &c. To the sheriffs of London, greeting: We command you, that you have the body of *C. D.* detained in our prison under your custody, as it is said, under safe and secure conduct, together with the day and cause of his being taken and detained, by whatsoever name he shall be called in the same, before our right trusty and well beloved *Lloyd lord Kenyon*, our chief justice, assigned to hold pleas in court before us, at his chambers situate in *Serjeants-Inn, Chancery-Lane*, immediately after the receipt of this writ, to do and receive all and singular those things, which our said chief justice shall then and there consider of him in this behalf; and have there then this writ. Witness *Lloyd lord Kenyon*, at *Westminster*, the 13th day of July, in the 31st year of our reign.

To bear teste in term.

Stormont and Way.

Præcipe.

London, *Hab. Corp.* for *C. D.* to do and receive, returnable immediately.

T. K. attorney.

To be taken to Messrs. *Provest* and *Webb*, pay signing, in term 6s. 8d. in vacation 7s. 8d. seal 7d. take

take same to the office where the action is entered, and if but one cause, and above 10*l.* pay 4*s.* 10*d.* for the allowance; fee to the judge, 2*s.* 4*d.* mittatis 2*s.* 4*d.* I think a memorandum is necessary on a 2*s.* 6*d.* stamp, or it must be annexed to the bail-piece.

If it be brought to remove a cause out of the inferior court under 10*l.* then bail must be put in below, and two days notice exclusive given for their coming into that court, and becoming bail for the defendant, in order that the plaintiff's attorney may have an opportunity of inquiring into the sufficiency, and upon their entering into a recognizance, before the judge below, for the payment of the debt and costs, then the judge will order the allowance of the writ.

How to proceed before allowance is made of habeas corpus, and action be under 10*l.*

But if the debt be above 10*l.* then if the defendant is not in custody, he has already given bail in the action, which is bail to render; therefore the cause is of course removed, by the *habeas corpus* being allowed.

How Plaintiff is to proceed after Cause removed.

After the bail is complete in the court below, the first step the plaintiff's attorney takes is, to apply to one of the judges clerks for a rule for bail, which is returnable in term, *within four days next after notice*, in vacation *six days*, next after notice, pay for same in term 1*s.* in vacation 2*s.* Serve defendant's attorney with a copy thereof; and if he does not put in bail within the *four or six days next after service*, nor take out a summons for time to put in bail (which he may do), then the plaintiff may issue out a writ of *procedendo*. N. on R. H. 10 W. 3.

How to put in Bail.

If the defendant puts in bail, then he must apply to the sheriff for a return to the *habeas corpus*; for until that be returned, no bail can be put in, as it may

To apply to the sheriff for *bab. corp.*

may appear what the causes are, for which defendant is detained.

No bail to be put in upon a *habeas corpus*, before the writ be returned.

It is ordered, that no bail shall be put in upon any writ of *habeas corpus* before that writ be returned, and that such bail shall not be taken by any justice of this court, unless that writ, with the return thereof, shall be offered before the said justice, to be filed at the time of putting in thereof. *R. H. 10 W. 3.*

When you have obtained the *habeas corpus* and return, annex a bail-piece thereto, 2s. stamp, and fill it up thus :

Bail-piece on *hab. corp.*

Michaelmas Term, in the 32d year of the reign of king Geo. III. *Stormont and Way.*

London, } *A. B.* is delivered on bail upon *habeas corpus*.

To *John Doe*, of London, gentleman,
and
Richard Roe, of the same place,
gentleman.

Oath for £20.

R. C. attorney,

At the suit of the plaintiff
in the plaint.

Take the bail and *habeas corpus* to a judge's chambers, who will enter them in the following recognizance, if above 10l. on the receipt of a memorandum or warrant to defend on a 2s. 6d. stamp.

Recognizance of bail on *hab. corp.*

" *You do jointly and severally undertake, that if the defendant be condemned at the suit of the plaintiff (or plaintiffs) in the plaint, that he shall satisfy the costs and condemnation, or render himself to the custody of the marshal of the Marshalsea of the court of King's Bench, or you will do it for him, if under 10l.*" *Vide Stat. 19 Geo. 3. c. 70.* Pay in term 4s. in vacation 5s.

Notice

Notice is to be given forthwith to the plaintiff's attorney, of the names and additions of the bail, the time when, and the judge before whom the same is put in. *R. M.* 1654 *sect.* 8.

In the *King's Bench.* John Denn, plaintiff,
and

A. B. defendant.

Take notice that special bail was this day put in upon the *habeas corpus* issued in this cause, before the honourable Mr. Justice Buller, at his chambers in *Serjeants-inn, Chancery-lane, London*, and the names are *John Doe*, of *London*, gentleman, and *Richard Roe*, of the same place, gentleman. Dated, &c.

Yours, &c.

R. C. defendant's attorney.

To Mr. R. T. attorney for the plaintiff.

Of Plaintiff's further Proceeding.

If the plaintiff's attorney does not like the bail, he may, instead of entering the exception (*as in common cases*), apply to the same judge for a rule for better bail, which is returnable *within four days next after service*, whether in term or vacation. *N. on R. M.* 16 *Car.* 2. a copy of which is to be served on the attorney for the defendant: If the bail do not justify within the *four days* (provided there are four days in the term left), then a *procedendo* may be issued; but if there be not *four days in term*, then upon the defendant's giving notice to justify *the first day of the next term, before the rule expires*, and the bail justifying on that day, no *procedendo* can issue.

It is ordered that every defendant, not being an executor or administrator, who shall sue out any writ of *habeas corpus* to remove any suit out of any inferior court, shall put in *special bail in all actions whatsoever* (actions for scandalous words and small assaults only excepted), unless one of the justices of this court shall otherwise order. *R. H.* 2 *Jac.* 2.

Of

Of Exception to Bail and justifying.

Exception to be
within 28 days.

If the plaintiff does not except against the bail, by taking out such rule *within twenty-eight days after the putting in thereof*, then the bail-piece shall be filed by the defendant's attorney, within *four days next after the end of the twenty-eight days*, under the penalty of 5s. to the box, *R. M. 16 Car. 2.*; and for the second offence to be struck off the roll.

Notice of justification.

Take notice that the bail already put in for the defendant in this cause, upon the writ of *habeas corpus*, and of whom you have had notice, will, on *Monday next*, justify themselves in open court, *Westminster-hall*, in the county of *Middlesex*, as good bail for the said defendant. Dated, &c. Yours, &c.

R. C. defendant's attorney.

To Mr. R. T. attorney for the plaintiff.

When to be
given.

This notice must be given *as in other cases of justification*, and defendant may add to the bail already put in *new bail*, and justify as in other cases; make affidavit of the service thereof, and give brief to counsel to move to justify, fee 10s. 6d. court fees 9s. rule for allowance 5s.; serve copy thereof on plaintiff's attorney.

Bail liable to all
actions.

The bail are liable in all the actions mentioned in the return of the *habeas corpus*, wherein the plaintiff or plaintiffs shall declare *within two terms*. *N. on R. Hil. 2 Jac. 2.* And if there be more causes than one returned in the *habeas corpus*, bail must, in that case, be put in for the whole. *Salk. 352.*

If there be more causes than one, a separate bail-piece must be added to each cause.

Cannot sign a
nonpro.

Where the defendant removes his cause, he cannot *nonpro* the plaintiff for want of a declaration, not being bound to follow the defendant. *N. on R. M. 16 Car. 2.*

Of Declaration, Venue and Plea.

Declaration.

After defendant has justified his bail, the plaintiff may declare against the defendant (or he may de-
8
clare

clare *de bene esse*, as soon as bail is put in above), and all the proceedings are *de novo*, for the record is not removed on a *habeas corpus*, as it is on a *certiorari*. *Saik.* 352. But such declaration must be delivered *within two terms*.

The declaration states the defendant to be in the Declaration. custody of the marshal, as in other cases.

If a cause be removed by *habeas corpus*, out of the *Venue*. courts of *Canterbury, Southampton, Hull, Litchfield, or Pool*, which are counties where the judges of *nisi prius* seldom come, if the action be transitory, it must be laid in the county of *Kent, Southampton, York, Stafford, or Dorset*; where the town and county lieth, and that in all causes of removal, be it by *habeas corpus, privilege, or certiorari*, special bail ought to be given. *R. M.* 1654. *sect.* 9.

Certain times are mentioned in *Harrison and Richardson's Practice* for pleading upon a *habeas corpus*; but I take it to be the settled practice, that if defendant lives within twenty miles of *London*, *four days; if above, eight days*; and the defendant has no *imparlance* allowed him upon a *habeas corpus*, although declaration be not delivered the same term the *ha. corp.* is brought. *Vide N. in R.* 2 *fac.* 2.

The rest of the proceedings are as in common cases.

If no Bail put in or justified, how to proceed.

If the defendant does not *put in or justify his bail in due time*, then issue the following writ of *procedendo*:

George the third, &c. To the sheriffs of *London*, *Procedendo*. greeting: Although we lately by our writ commanded you, that you should have the body of *C. D.* detained in our prison under your custody, as it was said, under safe and secure conduct, together with the day and cause of his being taken and detained, by whatsoever name the said *C. D.* might be called in the same, before our right trusty and well beloved *Lloyd lord Kenyon*, our chief justice, assigned to hold pleas

pleas in our court before us, at his chambers in *Serjeants Inn, Chancery-lane*, immediately after the receipt of that writ, to do and receive all and singular those things which our said chief justice should then and there consider of him in that behalf; yet we being now moved with certain causes in our court before us, command you, and every of you, that in all complaints and suits against the said *C. D.* at the suit of *A. B.* in our court before you, or any of you, now depending undetermined, you proceed with what speed you can, in such manner, according to the law and custom of our kingdom of *England*, as you shall see proper, our said writ to you first thereupon directed to the contrary in any wise notwithstanding. Witness *Lloyd lord Kenyon* at *Westminster*, the 13th day of *July*, in the thirty-first year of our reign. *Stormont and Way.*

Præcipe.

London, Procedendo for A. B. against C. D.—I. K. attorney; pay signing 5s. 8d. with Messrs. Provest and Webb, seal 7d. allowing 6s. 10d. attorney's fee, 3s. 4d. in the court below.

Directions to the inferior Courts.

AS a habeas corpus, and procedendo, must be directed properly to the inferior courts, such of them as I can collect, are as follow:

Mayor's court,
London.

To the mayor, aldermen, and sheriffs of London.

Sheriff's court
of ditto.

To the sheriffs of the city of London.

Marshall's.

To the judges of our palace court of Westminster, and to each of them, greeting.

If in sheriff's
court in any
county.

If it is in the sheriff's court in any county, direct it to the sheriff, as Middlesex, Berks, Oxford, &c.

Stepney.

To the steward of our court of record, within the manors of Stepney and Hackney, in the county of Middlesex, hamlets and liberties of the same, and also to the high bailiff of the said liberty, and to either of them.

To

To the marshal of our prison of the Marshalsea be- Marshal,
fore us.

To the warden of our prison of the Fleet. Warden of the Fleet.

To the mayor, aldermen, and sheriffs, of the city of Fleet.
Bristol, and the mayor and constables, keepers of the Bristol.
staple of the same city, in the court of Tolsey.

To the mayor, recorder, aldermen, and justices of the Bath.
city of Bath, in the county of Somerset, and to every
of them.

To the mayor, aldermen, burgesses, and recorder of the Bedford.
town of Bedford, in the county of Bedford,

To the mayor, aldermen, and burgesses of the town of Beverley.
Beverley, in the county of York.

To the bailiff and burgesses of the town of Bucking- Buckingham.
ham, in the county of Buckingham.

To the mayor, recorder, and burgesses of the borough Bury St. Ed-
of Bury Saint Edmond in the county of Suffolk. monds.

To the mayor and bailiffs of the town of Cam- Cambridge.
bridge.

To the steward of the liberty of by Divine Canterbury.
Providence archbishop of Canterbury, in the court of his
palace, within the city of Canterbury.

To our trusty and well-beloved Charles Yorke, Esq. our Ely.
chief justice assigned to hold the sessions of pleas within
the liberty or royal franchise of the honourable and right
reverend Father in God James by Divine permission,
lord bishop of Ely, within the isle of Ely, in the county
of Cambridge, and to Thomas Gotobed, Esq. chief
bailiff of the said bishop, within the liberty of the said
isle, and to each of them, greeting.

N. B. Annon-omittas or latitatis directed in this way.

To the mayor and bailiffs of our city of Exeter, in the Exeter.
county of Devon, and to the bailiffs, citizens, and pro-
vests of the same city.

To the mayor, aldermen, and citizens of the city of Hereford.
Hereford.

To the mayor and capital burgesses of the borough of Hertford.
Hertford, in the county of Hertford, and also to the
steward of our court of record there.

To the mayor and sheriffs of our town and county of Kingston upon
Kingston upon Hull, in the county of York. Hull.

S f

To

- Kingston upon Thames. *To the bailiffs and steward of our court of our town of Kingston upon Thames; and in the absence of the said steward, to the bailiffs and recorder of the same town, or any two of them.*
- Lincoln. *To the mayor, sheriffs, and citizens of the city of Lincoln.*
- Litchfield. *To the bailiffs, burghesses, and citizens of the city of Litchfield.*
- King's Lynn. *To the mayor and recorder of our town or borough of King's Lynn, in the county of Norfolk.*
- St. Martin's le Grand. *To the steward of the dean and chapter of the collegiate church of Saint Peter, Westminster, of the court of their liberty, or precincts of Saint Martin's the Great, in London, and to the constables there.*
- Newbery. *To the mayor, aldermen, and burghesses of the borough of Newbery, in the county of Berks.*
- Northampton. *To the mayor and bailiffs of the town and borough of Northampton in the county of Northampton.*
- Norwich. *To the mayor, aldermen, and sheriffs of the county of the city of Norwich.*
- Oxford. *To the mayor and bailiffs of the city of Oxford, in the county of Oxford.*
- Portsmouth. *To the mayor, aldermen, and burghesses of the town of Portsmouth.*
- Southampton. *To the mayor and bailiffs of our town of Southampton.*
- Taunton. *To the bailiff of the reverend father in Christ, by Divine Providence, lord bishop of Winchester, of his liberty of Taunton and Taunton Dean, in the county of Somerset.*
- Thetford. *To the mayor and recorder of our borough of Thetford, in the county of Norfolk.*
- Wells. *Wells, borough or city. To the steward or bailiff of our court of our pleas, granted to the reverend father in Christ, lord bishop of Bath and Wells, held at the Guildhall within the city and borough of Wells, in the county of Somerset.*
- Woodstock. *To the mayor of the town of New Woodstock, in the county of Oxford.*
- Worcester. *To the mayor, recorder, and aldermen of our city of Worcester, and to every, &c.*

To

To the mayor, aldermen, and sheriffs of the city of York.
York.

Ha. Corp. ad testificandum.

This writ also is issued where a witness is confined in prison, directed to the marshal, sheriff, &c. *Ha. cor. ad testificandum.* in order to bring him before the court where the cause is to be tried, to give evidence on the part of the person who sues it out, and called an *habeas corpus ad testificandum*, the form of which, and the mode of obtaining it, see p. 336.

If sailors on board a ship are to be produced as witnesses, and have been served with a *subpœna*, and say they will not attend, a *habeas corpus* may be applied for to the chief justice, on affidavit of that fact, and that they are material witnesses; but without which no *ha. corp.* can issue. *Rex v. Roddam. Cowp. Rep. 672.*

Court thought there could be no *ha. corp.* to bring up a prisoner at war. Lord Mansfield said, the presence of witnesses who are prisoners of war, was generally obtained by an order from the Secretary of State: and an application was made for a *hab. corp.* to bring up such a prisoner but without success. Afterwards a rule was granted to shew cause why defendant should not consent either to admit the fact of the capture, or that the prisoner should be examined upon interrogatories. If this consent be refused, the court said, they would put off the trial from time to time, to give the defendant an opportunity of filing a bill in equity. The plaintiff agreed to produce all letters received concerning the matters in litigation. *Furly v. Newnham. Dougl. Rep. 420.*

That *J. B.* now a prisoner for debt, in custody of the marshal of this court, is, and will be, a material witness for this deponent at the trial of this cause. And this deponent further saith, That he is advised, and verily believes, that he cannot safely proceed to the trial thereof, without the testimony of the said *J. B.*

Sl 2

Ha.

*Ha. corp. ad satisfaciendum.**Ha. corp. ad satisfaciendum.*

This writ is made use of by a plaintiff in this court, where his prisoner has removed himself *after declaration to the Fleet Prison*, in order to bring him here, to charge him in execution upon a judgment obtained, and it is called an *habeas corpus ad satisfaciendum*, to satisfy or make satisfaction to the plaintiff for the debt and damages by him recovered; which being obeyed, the court commit him again to the custody of the marshal, there to remain until he make satisfaction, and is made returnable *on a day certain* as the prisoner cannot be committed in execution, but by the court, whilst they are sitting: The form of which is as follows:

Ha. corp. ad satisfaciendum. in case.

g. stamp.

Put the term and No. roll on the writ.

George, &c. To the warden of our prison of the *Fleet*, greeting: We command you, that you have before us at *Westminster*, on *Monday* next after the morrow of *All Souls*, the body of *C. D.* under safe and secure conduct detained in our prison under your custody, as we are informed, together with the day and cause of his being taken and detained, by whatsoever name the said *C. D.* is there known, to satisfy *A. B.* 25*l.* which the said *A. B.* lately in our court before us at *Westminster*, recovered against the said *C.* for his damages which
he

Ha. corp. ad satisfaciendum. in debt.

George, &c. To the warden of our prison of the *Fleet*, greeting: We command you, that you have before us at *Westminster*, on *Monday* next after the morrow of *All Souls*, the body of *C. D.* under safe and secure conduct, detained in our prison under your custody, as we are informed, together with the day and cause of his being taken and detained; to satisfy *A. B.* as well a certain debt of 25*l.* which the said *A. B.* lately in our court before us at *Westminster*, recovered against the said *C. D.* as also 10*l.* for his damages which
which

he sustained, as well by reason of the not performing certain promises and undertakings lately made by the said C. to the said A. at *Westminster*, in the county of *Middlesex*, as for his costs

and charges by him laid out, about his suit, in that behalf, whereof the said C. is convicted, as appears to us of record, and further to do and receive what our said court before us, shall then and there consider of him in this behalf; and have there then this writ. Witness *Lloyd* lord *Kenyon*, &c.

Stormont and *Way*.

This is signed by Messrs. *Provest* and *Webb*, and a *præcipe* is made for that purpose; pay him 6s. 8d. seal 7d.; then it is to be lodged with the warden of the *Fleet*: On the day of the return, he is brought up, apply to one of the judges clerks, who will make out the commitment; pay the warden his fee for return and bringing-up; tipstaff 10s. 6d.; judge's clerk 4s.; the judge's clerk takes the *habeas corpus* into court with the defendant, and the master commits him.

N. B. The master marks the commitment on the duplicate of the writ, which is delivered to the tipstaff, who carries the prisoner over to the *King's Bench* prison. Pay master 2s.

Paupers.

A Pauper is a person said to be, by the law, so Definition.
poor and indigent in his circumstances, that he cannot dispense the usual charges to recover his right, either in *law* or *equity*.

It appears in very early times, viz. 1495, that In early times
poor persons
were obliged to
drop their claim.
poor persons having any claim to lands or other
right, were frequently obliged to drop the pursuit thereof

thereof in a court of *law or equity*; the expence being too great for them to bear. This being a great grievance to the subject, and, in order that men should not be stripped of their legal possessions and right, by the *Stat. 11 H. 7. c. 12.* it is enacted, That every poor person, who shall have cause of action, &c. shall have original writs, &c. nothing taking for the same, counsel, attornies, and all other officers requisite and necessary for the speed of the said suits to be had and made, who shall do their duties without any reward.

Every poor person shall have writs for no fee, counsel and attorney.

Sum to be under 5^l.

The courts have fixed the sum to be under five pounds (*except wearing apparel, and his right to the matter in question*). *Lill. Prac. Reg. 633.*

How to sue.

Therefore, if the plaintiff is so poor as above stated he must petition one of the judges of this court, to be admitted to sue *in forma pauperis*, and if he has begun the suit, and not able to carry on the same, yet he may petition to be admitted; ingross it on a treble 6d. stamp paper, annex also the affidavit thereto on treble 6d. then take same to the judge's chambers, and after oath is made thereof, the clerk will make out an order thereon, pay him 2s. 6d. The form of the petition and affidavit are as follow: No rule is drawn up in this case.

A. B. plaintiff,
and
C. D. defendant.

In the King's Bench.

To the right honourable Lloyd lord Kenyon, lord chief justice of his Majesty's court of King's Bench.

The humble petition of A. B.

Sheweth,

If the action is not begun, then say "And your petitioner hath not as yet commenced any action against him, being unable, &c."

That the said defendant is and stands justly indebted unto your petitioner in the sum of 10*l*. for the work and labour of your petitioner, done for the said defendant, at his request, and your petitioner hath commenced an action against him for the same.

That

That your petitioner finds himself unable to carry on the said cause, on account of his extreme poverty, as appears by the affidavit hereto annexed.

I humbly conceive, that the said petitioner hath good cause of action against the above-named C. D. and humbly accept to be his counsel.

J. M.

"Your petitioner, therefore, most
"humbly prays your Lordships,
"that he may be admitted in
"forma pauperis, to prosecute
"his said action, and that J. M.
"esq. may be assigned to him as
"his counsel, and J. J. his at-
"torney to prosecute his said
"suit.
"And your petitioner shall ever
"pray," &c.

King's Bench.

A. B. agt. C. D.

A. B. of, &c. yeoman, maketh oath and faith, that he is not worth five pounds in all the world (save and except the matter in question in this cause, and also his wearing apparel).

Affidavit.

The pauper, upon the order being made, may sue out his writ without stamps, pay nothing through all the cause for fees to any of the officers; if defendant pleads a special plea, shew petition and order to the clerk of the papers, and he will make up the paper book for nothing; no stamps are used for the record, venire, or distringas, nor for setting down the cause, or return of distringas.

But if you recover a verdict, the officers of the court claim the fees of court, and take for the passing the record; but by what authority, I never yet could learn. The declaration is in the common form; to which you annex a copy of the judge's order, of his being admitted.

Unless he recovers 5*l.* or more.

If the party give any fee or reward to his counsel or attorney, or make any contract or agreement with them, he shall be dispaupered, and not be admitted again in that suit. He is not liable to pay costs, but be in the discretion of the court, whether he shall be punished or not.

No fee to be paid to counsel or attorney.

Not liable to pay costs.

Stat. 23 H. 8. 2 Salk. 506.

He is not liable to pay the costs for judgment as in the case of a nonsuit, 3 Will. 24.; nor to pay the costs

Nor for judgment, as in the case of a nonsuit.

May be dispaupered if vexatious.

costs before he brings a new action, if it does appear that he has not been vexatious. *Str.* 878. If he has been vexatious, as giving six notices of trial, and not proceeding, the court will dispauper him, but not make him pay costs. *Ibid.* 983.

After nonsuit and a new action brought before payment of the costs.

The plaintiff being nonsuited in a former action against the defendant, brought a *second action for the same cause*, and sued *in forma pauperis* being a prisoner in the *K. B.* The costs of the former action amounted to 32*l.* which the defendant swore he could not levy, the plaintiff not having any goods. Rule why the proceedings in the second action should not be staid until the costs of the former were paid, made absolute. *Weston v. Withers.* 2 *Term Rep.* 511.

Can only sue in cause he is admitted.

A person admitted *in forma pauperis*, can only sue in that cause for which he is admitted, so that if any other cause arises, he must be admitted again *de novo*, *et sic toties quoties.* *Lil. Reg.* 633.

Cannot be admitted to defend.

Although the stat. of 11 *H.* 7. admits poor persons to prosecute, yet it has not provided for poor defendants to defend, nor does the stat. of 23 *H.* 8. exempt them from paying costs; therefore they cannot petition to defend *in forma pauperis.*

Consolidating of Actions.

How to consolidate.

If there be two or more actions brought upon the *same policy* of assurance against the underwriters, or *two or more ejectments* on the demise of the same lessor of the plaintiff *for the same premises*, and they proceed separate, the defendants may apply to the court by way of motion to consolidate such actions; if in term time, it is a rule to shew cause, pay 8*s.* 6*d.* each, if in vacation, by way of summons, before a judge; and upon their undertaking to be bound, and concluded, in all the actions, by the fate of the verdict in the action brought against the first defendant, and to bring no writ of error, the court will stay all the proceedings in the last actions until further order; but all the rules must be paid for separate,

separate, as also the summonses and orders; and if the verdict turns in favor of plaintiff, *to the satisfaction of the judge who tried the cause*, the plaintiff may proceed to tax his costs on that verdict, and get the defendant's attorney to attend the master, who will tax the costs in the other actions, which if complied with (*as is usual*), and not paid, with the debt; move the court, upon an affidavit of the facts, "*for leave to enter up the judgment, and take out execution thereon, and that the master may tax the costs in all the causes, and for the costs of the application*;" one stamp for the affidavit is sufficient, which the court will order; after the costs are taxed, they are to be paid within a limited time, if not, sign the judgments upon a double half-crown stamp, and take out execution thereon; you pay for separate rules, and counsel's fees are not fixed.

If two actions are brought by the same plaintiff, for causes which may be joined, and the defendant be holden to bail in both, the court will compel the plaintiff to consolidate them, and pay the costs. *Cecil v. Burgess. 2 Term R. 639.*

This rule may be applied for on the same day *the plea is delivered or filed*; for in that rule will be contained, a stay of the proceedings which will prevent all the issues being made up and delivered. But you must plead before the application.

If two actions be brought which might have been tried.

When rule may be applied for,

Abatement.

THE general rule to be observed in this case is, that where the death of any party happens, and yet the plea is in the same condition as if such party were living, there such death makes no alteration or abatement of the writ. *10 Mod. 251. Gil. C. P. 242. Vide title Reviving Judgments, and stat. 8 & 9 W. 3. c. 11.* respecting the death of one of the plaintiffs or defendants.

When no alteration made by death.

By the *stat. 17 Car. 2. c. 8.* it is enacted, that the death of either party between verdict and judgment,

Death of either party between verdict and judgment, not error.

Death before
assize, suit
abates; if after
the day, not.

ment, shall not be alledged for error, so as judgment be entered *within two terms after such verdict*.

If either party die *before the assizes*, it is out of the statute; but if *after the assizes*, though before trial, it is no error; for the assizes is but one day in law. *Salk. 8. pl. 21. 2 Ld. Raym. 1415.*

If *after verdict*, and *before the day in bank*, the plaintiff dies, and the defendant signs judgment the second term after the verdict, this is within the statute, and the same as if he had entered judgment on the roll. *Sid. 385.* But a *sci. fa.* must issue before execution. *1 Wils. 302. Earl v. Brown.*

Ejectment.

In ejectment, defendant died between the first day of the assizes and verdict: The court held the judgment well entered. *Robertson v. Moor, 12 Mod. 241. 1 Sid. 131.*

Ejectment

against baron and
feme, baron dies
between the day
of *nisi prius* and
day in bank,
it is good against
the feme.

An ejectment, against baron and feme, after verdict for the plaintiff, baron dies between the day of *nisi prius* and the day in bank; adjudged that the writ should stand good against the *feme*, because it is in the nature of a trespass, and the feme is charged for her own act; and the action survives against her; so if the wife had died, the baron should have judgment entered against him. *Cro. Jac. 356. Cro. Car. 509. Roll. Rep. 14. Moore, 469.*

If feme takes
husband after
verdict, and be-
fore the day in
bank, she shall
have judgment,
but a *sci. fa.*
must be sued.

If a feme sole plaintiff after verdict, and before the day in bank, takes husband, she shall have judgment, *Cro. Car. 232.* but a *sci. fa.* must be sued out before execution.

If pending an ar-
gument plaintiff
dies, the suit
does not abate.

If pending an argument on a special verdict, and the court takes time to consider thereon, the plaintiff dies, the judgment will be ordered to be entered up as of the term in which judgment ought to have been signed, *1 Burr. 226.*; the like may be done if the defendant dies. *Ibid. 147. 4 Burr. 2277.*

So if defendant
dies.

A feme sole can-
not by marriage
abate her writ.

A feme sole cannot abate her own writ by marriage, for this would be taking advantage of her own act. *2 Roll. Rep. 53.*

If a feme sole is sued, and after takes husband, it is no abatement; for the plaintiff would be in a fine condition if, after they have arrested a woman, she shall be allowed to overthrow the proceedings by a subsequent marriage. *Ld. Raym. 1525. 2 Str. 811. King & Ux. v. Jones.*

But if an action be brought in an inferior court against a feme sole, and pending the suit, she marries, and afterwards removes the cause, and the plaintiff declares against her as a feme sole, she may plead coverture at the time of the *habeas corpus*, because the proceedings here are *de novo*, and the court takes no notice of what was precedent to the *habeas corpus*; but it is said, the course in those cases is to move the matter to the court upon the return of the *habeas corpus*, and the court will grant a *procedendo*; for though a *habeas corpus* be a writ of right, yet where it is to abate a rightful suit, the court may refuse it, *1 Salk. 8. pl. 10. Sid. 40. Cro. Car. 104.*

The law abhors multiplicity of actions; and therefore whenever it appears upon record, that the plaintiff has sued out *two writs* against the defendant for the *same thing*, the *second writ* shall *abate*; but then it must plainly appear to be for the *same thing*. *Mod. 418. 539. 5 Co. 61.*

Suggestion on Record.

London, (s.) A. B. complains of C. D. being, &c. in a plea of trespass on the case, For that whereas the said C. D., on the 1st day of November, in the year of our Lord 1789, to wit, at London, &c. was indebted to the said A. B. and one C. H. his partner (which said C. H. the said A. B. suggests to the court here, according to the form of the statute in such case made and provided, since the issuing of the writ of latitat against the said C. D. at the suit of them the said A. B. and C. H. to wit, on the 28th day of November, in the year aforesaid, at London aforesaid, in, &c. died, and the said A. B. survived him, which the said C. D. doth

If she is sued, and takes husband, writ does not abate.

Marriage after suit in an inferior court, pleadable in abatement in superior court after removal.

How to proceed,

If there are two suits pending for the same cause of action, the second suit shall abate.

Suggestion on the declaration of the death of one of the plaintiffs, after writ, sued out.

doth not deny), in 20*l.* of lawful money, &c. for divers goods, wares, and merchandizes, by the said *A. B.* and *C. H.* in his life-time before that time sold, &c.

Suggestion of the death of one of the plaintiffs after issue joined.

Go to the end of the issue; the same day is given to the parties aforesaid at the same place; then say, before which day, to wit, on the day of in the year aforesaid, at *London* aforesaid, in, &c. the said *A. B.* suggests to the court here, according to the form of the statute in such case made and provided, that the said *C. H.* died, and the said *A. B.* survived him, which the said defendant doth not deny: And the said defendant by his attorney came; but the said sheriff did not send the said writ, nor did he do any thing thereon; therefore, as before it is commanded to the said sheriff, that he cause to come before our said lord the king, at *Westminster*, on next after twelve, &c. by whom, &c. and who neither, &c.

Suggestion of the death of one of the defendants after verdict.

To the end of the *poslea*. And upon this the said plaintiff says, that after the last continuance of the plea aforesaid, to wit, on the day of in the year aforesaid, at, &c. in the county aforesaid, the said *C.* died, and this is not denied; therefore let all farther proceedings against the said *C.* cease; whereupon the said plaintiff prays judgment against the said *J.* for the damages, costs, and charges aforesaid, by the jury aforesaid, in form aforesaid assessed, to be adjudged to him, &c. therefore it is considered, &c.

Suggestion of the death of one of the defendants in the *jurata* of the record, when it ought to have been upon the *nisi prius* record, and before the *jurata*, right suggested on the roll, and held good.

Upon a writ of error it appeared, that the death of *Rebecca Savil Far* was suggested in the *jurata* of the record of *nisi prius*, and not in the usual way, and afterwards the death was suggested upon the roll in the usual way. The error assigned was, "That there is no record of *nisi prius*, and that judgment is given for the plaintiff below, whereas it ought to have been given for the defendant;" then a *certiorari* issued, to certify the record of *nisi prius*, which was done, and in *nullo est erratum* pleaded by defendant in error, the objection taken was, that it ought to have

have been suggested upon the *nisi prius* record, and that it is not sufficient in the *jurata*. Lord Mansfield—The suggestion, award, and all the proceedings shew one of the defendants to be dead; and there is an award for the proceedings to stay as to this defendant, and to go on against the other only; and the jury is awarded as against the living one, the other being dead; both were alive when the issue was joined; a day was given to the parties, one defendant is awarded to come, the other not, and the sheriff doth not return the writ, and a *new venire* is awarded to try the issue against the surviving defendant, and it is properly awarded upon the issue roll, and acknowledged. The *nisi prius* roll is only for the direction of the judge, to try it; and it is not traversable on the roll, the judgment is right enough. 1 Burr. 363. *Far v. Denn*.

Suggestion on the London Act.

By 3 Jac. 1. c. 15. s. 4. it is provided, That if one citizen of London sue another out of the jurisdiction, and does not recover 40s. he shall not only lose his own costs, but shall also pay to the defendant so much ordinary costs, as such defendant shall justly prove it hath cost him in defence of the suit.

A creditor suing in another court shall pay costs, and recover none.

By sect. 2. the right of suing in this court is only given to "every citizen and freeman, or any other person inhabiting within the city or its liberties, being a *victualler, tradesman, or labouring man*;" against persons of the same description, the 4th sect. makes it necessary for defendant to prove that he was an inhabitant and resident of the city, but says nothing restrictive of the description of the plaintiff.

If the plaintiff does not recover the sum of 40s. against any the persons described in stat. 14 Geo. 2. c. 10. the defendant may, the next term after verdict, apply to the court upon affidavit, stating, "that at the time of the commencement of the suit, the defendant did, and ever since hath, and still doth reside

The Westminster, and most of the other acts, must be pleaded.

and

and keep a house in King-street, Cheapside, in the city of London, and liable to be summoned to the court of requests held at the Guildhall of the said city, and the debt for which the action was brought was contracted in the said city, and that the plaintiff proceeded to trial in the said cause, and obtained a verdict for 32s. and no more;" for a rule to shew cause why the plaintiff should not bring the *poslea* into court, and file the plea-roll, so that the defendant may enter a suggestion thereon, that the damages recovered in the action do not amount to 40s. and that the defendant, at the time of the commencement of the action, was an inhabitant and resident within the city of London, and liable to be summoned to the court of requests there; and why the plaintiff should not pay to the defendant double costs of suit, pursuant to the statute, and in the mean time further proceedings be staid; pay for rule 11s. counsel 1l. 1s.; serve copy on plaintiff's attorney, and if no cause shewn, make affidavit of the service thereof, and move to make it absolute; counsel one guinea; tax the costs on the rule with the master, on his appointment.

Who is within
the act.

A captain of a Portuguese ship that lay on board it, and constantly at the Royal Exchange, was held to be a person within the 14 Geo. 2. c. 10. by the court below, and had costs allowed him.

If judgment goes
by default, no
suggestion.

After an inquest taken by default, defendant came into court and suggested upon the roll, that plaintiff ought not to recover, &c. setting out the statute of 3 Jac. 1. *Per Cur.* The inquest being taken by default, the defendant is out of court as to all purposes but having judgment against him; after a default there can be no repleader. *Brampton v Crabb, Str. 46.*

Costs are to be
paid of the ap-
plication.

Verdict for less than 40s. in London, court gave the defendant leave to suggest it on record, which being entered, a demurrer was put into it, and adjudged for the defendant; it came to be a question, whether costs of the application should be allowed, and the court ordered it. *Hickman v. Colley, Str. 1120.*

I should

I should state in the affidavit, the *residence* of plaintiff and defendant in the city at the time of the commencement of the action, and their occupations; and so is 1 *Wils.* 20.

In *Dougl.* 449. I find affidavit only states, that defendant resided in the county of *Middlesex*, and liable to be summoned. And in p. 245. that defendant was an inhabitant in the city of *London*, and liable to be sued in the court of conscience there, under *stat. 3 Jac. 1. c. 15.* And the reporter adds, that defendant ought to shew that the plaintiff was such a person as is authorized by *sect. 2. to sue in the city court.* *Vide Str.* 1191. *Vide Dougl.* 247.

On trial at *Guildhall*, the plaintiff proved 4*l.* 15*s.* A set-off reducing the demand to 40*s.* does not affect the jurisdiction. 3*d.* due to him, which was discharged by a set-off to 1*l.* 13*s.* 3*d.* the defendant moved upon 3 *Jac. 1. c. 15.* for a suggestion; but the court held, he was not entitled to the benefit of that act, for it was plain the real demand was above 40*s.* and how could the plaintiff tell whether the defendant would set off any thing in that action, so as to be bound to chuse that jurisdiction? besides, he has in effect recovered 4*l.* 15*s.* 3*d.* because a debt which he must have otherwise paid, is now satisfied. The plaintiff had judgment for the 1*l.* 13*s.* 3*d.* and his costs. *Str.* 1191. *Pitts v. Carpenter.* 8 *C. 1 Wils.* 20.

But if the plaintiff's demand be for 15*l.* 3*s.* 9*d.* But when payments are given in evidence on the plea of *non assumpsit*, and reduced to 1*l.* 13*s.* 9*d.* by payments made under the plea of *non assumpsit* to plaintiff (and no advantage taken of the set off), it was held, that a suggestion upon the act might be entered. *Barnes* 354. *Benson v. Hemming.* *Sc.*

If the damages are under 40*s.* in *assumpsit* against an inhabitant of *Middlesex*, the defendant shall have double costs, whether the plaintiff sues in his own right, or as personal representative under 23 *Geo. 2. c. 33.* *Dougl.* 247. *Wase v. W, burd.* But a personal representative cannot be sued in the county court of *Middlesex*, and shall therefore pay costs above, though damages under 40*s.* *Ibid.* 264. *Alway v. Burrows.*

Action

On reference.

Action brought for goods sold, plea general issue, on which issue was joined. A rule of reference was made at the trial. The arbitrator awarded 1*l.* 17*s.* due to the plaintiff; no set-off was made by the defendant. Motion was made for a suggestion, both parties living within the jurisdiction of a court of conscience, viz. *Southwark*. *Cur.* said, had a verdict been for the plaintiff under 40*s.* there must have been a suggestion, so in this case; and the defendant had his costs. *Buller v. Grubb*. *Hil. T.* 1783.

If there be a plea of tender, and plaintiff have a verdict for 7*s.* 6*d.* more, defendant is liable to the costs. *Heaward v. Hopkins*. *Dougl.* 448.

Discontinuance.

DISCONTINUANCE is an interruption, intermission, or cessation, of the course of a thing, as discontinuance of possession of a plea, process, &c. The effect of discontinuance of process, is, that the opportunity of prosecution is lost, and not recoverable but by beginning a new suit.

After demurrer joined and entered, cannot discontinue without motion.

It has been ruled that plaintiff may discontinue upon motion after a special verdict, which is not complete and final, but never after a general verdict. *1 Salk.* 178. So after inquiry executed and returned. *Carth.* 86.

After verdict.

After issue and a verdict, cannot discontinue without consent of defendant; for if plaintiff will not enter up judgment, defendant may. *Salk.* 178. After demurrer argued and allowed, it may be discontinued on payment of costs. *Sir.* 76. 116. *3 Lev.* 440.

But before or after declaration he may, by *side-bar* rule.

The plaintiff may, if he sees occasion, discontinue before or after declaration delivered, by a motion at the *side bar*, on payment of costs. *N. on R. Mich.* 10 *Geo.* 2. which is done, by getting a rule for that purpose, at clerk of the rules; pay 4*s.* get appointment thereon to tax the costs by the master, then

then make copy and serve it on defendant's attorney, if he does not attend, the master does not wait till the third appointment, but will tax on the first if plaintiff wishes it; they must be paid forthwith, as the rule is conditional, and has no effect until payment is made. But in *replevin* the avowant cannot have a rule. *Str. 112. Long v. Buckeridge.*

Feigned Issue.

THIS is generally directed either by the court of *Chancery* or *Exchequer*, where in a suit a matter of fact is strongly controverted, these courts being so sensible of the deficiency of trial by written depositions, that they will not bind the parties by their decree, but direct the matter to be tried by a jury; especially such important facts as the validity of a will, or whether *A.* is heir at law to *B.* or the existence of a *modus decimandi*, or real and immemorial composition for tithes; therefore as no jury can be summoned to attend the Chancery, or Exchequer on the Equity side, the fact is usually sent to be tried by the court of *Chancery* to the *King's Bench*; and the court of *Exchequer* to the law side of their own court, upon a feigned issue; wherein the plaintiff declares, that he laid a wager of 5*l.* with the defendant, that *A.* was heir at law to *B.*; and then avers that he is so; and brings his action for the 5*l.* The defendant allows the wager, but avers that *A.* is not the heir to *B.*; and thereupon the issue is joined.

Generally directed by the courts of equity.

N. B. These courts direct the fact to be tried by the decree, and who are to be plaintiff and defendant, and also that the attorney for the defendant shall forthwith appear and plead. A writ is taken out in the common way, and all the proceedings are as in common cases, except that there is no imparlance allowed; the decree ordering him to plead forthwith.

These courts direct who are to be plaintiff and defendant.

T t

By

By this mode the dispute is to be determined, which saves all the formality of pleading, and a great expence to the parties.

When a feigned issue is directed by a court of law, the costs follow the verdict: But when an issue is directed by the court of *Chancery*, then this court gives no costs. *Herbert v. Williamson*, 1 *Wils.* 324.

Court of Chancery refer to the *K. B.* or *C. P.* on the words of a will, by way of case.

But if a question of *mere law* arises in the course of a cause, as whether by the words of a will, an estate for life or in tail is created, or whether a future interest devised by a testator shall operate as a remainder, or an executory devise; it is the practice of the court of *Chancery*, to refer it to the court of *King's Bench* or *Common Pleas*, upon a case stated for that purpose; wherein all the material facts are admitted, and the point of law is submitted to their decision; who thereupon hear it solemnly argued by counsel on both sides, and certify their opinion to the chancellor. But the Exchequer direct the issue to be tried on the plea side of their own court.

How to proceed.

To proceed therefore in this matter, a case is settled by counsel on both sides, and signed; then move for a *concilium*, the same as on a special cause; set down the case with Mr. *Austin*, and deliver each judge, a copy of the case as settled two days before argument.

Declaration on feigned issue, to try the validity of a will.

Middlesex, (ss.) A. B. complains of *C. D.* being in the custody of the marshal of the *Marshalsea*, &c. For that whereas, on the day of in the year of our Lord 1782, to wit, at in the said county, a certain discourse was moved and had by and between the said *A. B.* the now plaintiff, of the one part, and *C. D.* of the other part, of and concerning a certain freehold messuage, with the appurtenances, situate at in the county of late the estate of one *F. B.* deceased, and of which freehold estate the said *F. B.* deceased, before, and on the day of in the year 177 was seised in his demesne, as of fee, and afterwards died seised thereof, and also of and concerning

cerning a certain paper-writing dated the said day of in the said year 177 , purporting in itself to be the last will and testament of the said *F. B.* deceased: *And* whether the said *F. B.* deceased, did by the said paper writing, so purporting as aforesaid, devise the said freehold estate (among other things) or not, to the said *A. B.* the now plaintiff; and upon that discourse the said *A. B.* the now plaintiff, then and there asserted and affirmed, that the said *F. B.* deceased, did by the said paper-writing, dated the said day of in the year 177 , devise the said freehold estate to him, which said assertion and affirmation of the said *A. B.* the now plaintiff, he the said *C. D.* then and there wholly denied, and then and there alledged the contrary thereof, and thereupon afterwards, to wit, on the said day of in the year 1782 aforesaid, at aforesaid, in the county aforesaid, the said *A. B.* the now plaintiff, at the special instance and request of the said *C. D.* undertook, and then and there promised the said *C. D.* to pay him the sum of 5*l.* in case the said *F. B.* deceased, did not by the said paper-writing, dated the day of in the year 177 , devise the said freehold estate (amongst other things) to him as aforesaid, and in consideration thereof, he the said *C. D.* then and there undertook and faithfully promised, tne said *A. B.* the now plaintiff, to pay him the sum of 10*l.* in case the said *F. B.* deceased did by the said paper-writing, dated the day of in the year 177 , devise the said freehold estate (amongst other things) to the said *A. B.* the now plaintiff as aforesaid; and the said *A. B.* the now plaintiff, avers, that the said *F. B.* deceased, did by the said paper-writing, dated the day of in the year 177 , devise the said freehold estate (amongst other things) to him as aforesaid, to wit, at aforesaid, in the county aforesaid, whereof the said *C. D.* afterwards, to wit, on the said day of in the year 1782, aforesaid, at aforesaid had notice, by means

T t 2

whereof

Breach,

whereof he the said *C. D.* according to the tenor of his promise and undertaking as aforesaid, became liable to pay, and ought to have paid, the said sum of 10*l.* to the said *A. B.* the now plaintiff, to wit, at aforesaid, in the county aforesaid; yet the said *C. D.* not regarding his said promise and undertaking so by him made in this behalf as aforesaid, but contriving, and fraudulently intending, craftily and subtilly to deceive and defraud the said *A. B.* the now plaintiff, in this behalf, hath not yet paid the sum of 10*l.* or any part thereof, to the said *A. B.* the now plaintiff (although so to do, he the said *C. D.* was requested, by the said *A. B.* the now plaintiff, afterwards, to wit, on the said day of in the year 1782 aforesaid, and often afterwards, to wit, at aforesaid in the county aforesaid); but he to pay the same, or any part thereof, to the said *A. B.* the now plaintiff, hath hitherto wholly refused, and still refuses, to the said *A. B.* the now plaintiff, his damage of 20*l.* and therefore he brings his suit, &c.

Plea.

And the said *C. D.* by *J. G.* his attorney, comes and defends the wrong and injury, when, &c. and says, that true it is, that such discourse was moved and had, by and between the said *A. B.* the now plaintiff, and the said *C. D.* as is above mentioned in the said declaration, and that he the said *C. D.* did undertake and promise, in manner and form as the said *A. B.* the now plaintiff, hath above thereof complained against him: But the said *C. D.* saith, that the said *A. B.* the now plaintiff, ought not to have his aforesaid action thereof maintained against him; because he says, that the said *F. B.* deceased, did not by the said paper-writing, dated the day of in the year 177 , devise the said freehold estate (amongst other things) to him the said *A. B.* the now plaintiff as aforesaid, and of this he puts himself upon the country: And the said *A. B.* doth the like. Therefore, &c.

Popular

Popular Actions.

Compounding them.

BY stat. 18 *Eliz. c. 5. sect. 3.* "No informer shall compound or agree with persons that shall offend against any penal statute for an offence committed; but after answer made in court unto the information or suit: Nor after answer, but by order of that court: That if any person shall offend, make any composition, or take any money, reward, or promise of reward, for himself, or to the use of any other, without order or consent of some of her majesty's courts at *Westminster*, and be convicted, shall stand on the pillory, &c. and be disabled to be plaintiff or informer in any suit upon any statute, popular or penal: And forfeit ten pounds, &c." *Sect. 4.*

No informer shall compound with defendant but by the consent of the court.

This act not to restrain any certain person, body politic or corporate, to whom or to whose use any forfeiture, penalty, or suit, is or shall be specially limited or granted, by virtue of any statute, and not generally to any person that will sue. *Sect. 6,*

Penalties given to persons certain not generally.

It seems clear both from the preamble and the whole tenor of the statute, that it extends only to suits by common informers, and not to those by a party grieved. 2 *Haw. 279.*

It extends only to suits by common informers

In an action for making and selling gold rings, of less fineness than statute directs, moved for leave to compound without consent. *Per Cur.* It is in the discretion of the court to give leave to compound; and afterwards they refused the motion. *Howell, qui tam, v. Morris. B. R. 1 Wils. 79.*

Leave to compound denied upon the statute

Poole moved for leave to compound on the part of the prosecutor upon the statute of gaming, upon an affidavit that the defendant and one *A. B.* used to play at cards together, and that the defendant had won divers sums of *A. B.*; that *A. B.*

Leave given to compound on the statute of gaming.

was become a bankrupt, and that the assignees, who set this prosecution on foot, were satisfied with respect to the defendant; and the court granted the motion. *Ibid.* 130.

Poverty.

On an affidavit of defendant's poverty, the court will give leave to the prosecutor *qui tam* to compound, though in execution. *Str.* 167. *Bradshaw v. Mottram.*

How to proceed,

This motion is made upon the affidavit of one of the parties, stating, that an action is brought upon such an act of parliament, and that the declaration contains penalties to the amount of 150*l.* that since the said defendant has pleaded *nil debet*, and that the plaintiff and defendant have agreed to compound the same for the sum of 50*l.* and that no more is given or taken, nor is it compounded in any other way than by leave of the court.

Give this affidavit to counsel, likewise the plaintiff must give a brief upon a slip of paper to consent to the motion on payment of the sum of 50*l.* agreed, his fee half-a-guinea.

The court made a rule, that where they give leave to compound a penal action, the *king's half* of the composition shall be paid into the hands of the Master of the *Crown-office*, for the use of his majesty. It is now paid before the rule drawn up. *Brown, qui tam, v. Bailey.* 4 *Burr.* 1929.

Arbitration.

Definition,

ARBITRATION, or arbitrage, is where the parties, injuring and injured, submit all matters in dispute, concerning any personal chattels or personal wrong, to the judgment of two or more arbiters or arbitrators, who are to decide the controversy: and if they do not agree, it is usual to add, that another person be called in as umpire (*imperator* or *impar*), to whose sole judgment it is then referred; or frequently there is only one arbitrator originally appointed. This decision, in any of these

these cases, is called *an award*: and thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties, or the judgment of a court of justice. Experience has shewn the great use of these peaceable and domestic tribunals, especially in settling matters of account, and other mercantile transactions, which are difficult, and almost impossible to be adjusted on a trial at law; the legislature has now established the use of them, as well in controversies where causes are depending, as those where no action is brought, and which still depend upon the rules of the common law; enacting by *Stat. 9 & 10 W. 3. c. 15*. "That all merchants and others, desiring to end any controversy (for which there is no other remedy but by personal action or suit in equity) may agree, that their submission to arbitration or umpirage of any person, &c. shall be made a rule of any of his majesty's courts of record; which agreement, &c. shall, upon producing an affidavit made by the witnesses thereunto, or any of them, in court, be entered and filed of record of the said court, and a rule shall thereupon be made by the same court, that the parties shall submit to, and finally be concluded by the arbitration or umpirage, &c. and in case of disobedience, the party neglecting shall be subject to all the penalties of contemning a rule of court; unless such award shall be set aside for corruption or other misbehaviour in the arbitrators or umpire, proved on oath to the court before the last day of the next term after the award is made." And in consequence of this statute it is now become a considerable part of the business of the superior courts to set aside such awards when *partially* or *illegally* made; or to *enforce their execution*, when *legal*, by the same process of contempt as is awarded for disobedience to those rules and orders which are issued by the courts themselves. But in a case where the parties attempted to set aside an award, *Lord*

Merchants, &c. desiring to end controversies by arbitration, may agree their submission to the award of any person, be made a rule of court.

In case of disobedience, party neglecting subject to attachment, unless, &c.

The ground to
impeach.

Hardwicke said, that the only ground to impeach an award is, collusion, or gross misbehaviour of the arbitrators, or otherwise it is final and binding upon all parties, otherwise no persons would ever undertake to be arbitrators. 3 Atk. 529. Lord Mansfield in another case said, that the court will not enter at all into the merits of the matter referred to arbitration, but only take into consideration such legal objections as appear upon the face of the award, and such objections as go to the misbehaviour of the arbitrators. 2 Burr. 701. *Lucas v. Wilson*. Nothing but manifest corruption in the arbitrators, is good ground within the stat. 9 & 10 W. 3. to set aside an award. We will not unravel the matter, and examine into the justice and reasonableness of what is awarded. Str. 301. *Ander-son v. Coxeter*.

Awards considered with greater latitude and less strictness than formerly.

Awards are now considered with greater latitude and less strictness than they were formerly. And it is right that they should be liberally construed; because they are made by judges of the parties own choosing. They must have two properties to be certain and final. But the certainty may be judged of according to a common intent, and consistent with fair and probable presumption. 1 Burr. 277. *Hawkins v. Calclough*.

Costs.

An arbitrator may award costs without any express authority for that purpose. *Roe v. Doe*. 2 Term Rep. 644.

When motion ought to be made.

The motion to set aside an award on an obligation, must be made before the last day of the next term after such award is published; otherwise it is too late, and an attachment for the non-performance of it may issue. Cow. Rep. 23. *Freem v. Pinneger*. Str. 301. This does not relate to an award made in pursuance of an order of *nisi prius*. Str. 301.

If an award is made, then to proceed by making the submission a rule of court.

If an award is made, and the party will not perform it, such as not paying the money, &c. at the time and place therein mentioned, and you have attended for that purpose ready to receive it; first proceed to make the submission a rule of court, upon an affidavit of due execution of the bond, thus:

C. G.

C. G. of, &c. maketh oath and faith, That he was present at the time of signing and sealing the bond or obligation hereunto annexed; and *C. D.* of, &c. therein mentioned, did duly sign, seal, and as his act and deed deliver the said bond, in the presence of this deponent, and that the name *C. D.* set and subscribed to the said bond, is of the proper hand-writing of the said *C. D.* and that the name *C. G.* set and subscribed as the witness thereto, is of the proper hand-writing of this deponent.

Affidavit of the due execution of the bond.

This affidavit is to be ingrossed on a treble six-penny stamp paper; give it to counsel "*to move to make the submission a rule of court,*" pay him 10s. 6d. draw up the rule with the clerk of the rules, pay 2s. *per sheet*, make copy thereof, and of the award, with the names of the arbitrators and witnesses, then the person who is to receive the money must demand same, which not being complied with, make the following affidavit to move for an attachment, and also an affidavit of the due execution of the award; which see after.

How to proceed to get an attachment.

In the *K. B.* between

A. B. plaintiff,

and

C. D. defendant.

A. B. of *Fleet-street, London*, grocer, maketh oath and faith, That he this deponent did, on the 4th day of *June last*, personally attend from the hour of one, until the hour of two of the clock in the afternoon of the same day, at the *Mitre Tavern, Fleet-street, London*, and then and there demanded of the above-named *C. D.* who also attended, the sum of 50*l.* awarded due to this deponent, pursuant and agreeable to a certain award in writing, which is hereunto annexed; but the said *C. D.* did not then pay to this deponent the said sum of 50*l.* or any part thereof: And this deponent further faith, That having, on *Thursday* next after one month from *Easter* day, in this present *Easter* term, caused the submission of this deponent, and the said *C. D.* to the said award, contained in a certain bond or obligation, bearing date the first day of *May 1782*, to

Affidavit of the demand and refusal.

The place mentioned in the award.

be

be made a rule or order of this honourable court, he this deponent, on the day of last, served the said *C. D.* with a true copy of the said rule or order of this honourable court, and at the same time shewed him the said original rule or order: And this deponent further saith, That he did at the same time, demand of him the said *C. D.* the said sum of 50*l.* so awarded due to this deponent as aforesaid; but the said *C. D.* did not then, or at any time since, pay the same or any part thereof to this deponent, and the whole of the said sum of 50*l.* now remains due and owing to this deponent, on the said award.

Positive affidavit
as to demand.

There must be a positive affidavit of *personal notice of award and demand of the money all at one time* on motion for an attachment, because it brings the party into contempt. 12 *Mod.* 257. *Anon.*

If party absconds.

If an award be made a rule of court, and the party who refuses to obey the award absconds, so that he cannot be found on a week day, service thereof on a *Sunday* is sufficient to bring him into contempt, whereon to have an attachment. *Ibid.* 158.

How to move
for the attachment.

Give affidavit to counsel, "*to move for an attachment for not paying the money on the award in pursuance of the rule of court,*" see 10*s.* 6*d.* it is a rule to shew cause, pay 2*s.* per sheet; draw it up at clerk of the rules, and serve copy thereof; make affidavit of the service, give counsel one guinea to make it absolute, which being done, draw up rule, pay 2*s.* per sheet; take it to the Crown Office to your clerk in court, who will make out an attachment, fee 13*s.* 4*d.* get a warrant thereon, and give it to your officer, pay him one guinea for the caption.

How to proceed on a Rule of Reference.

If there be a rule of reference, it is best for the attornies to get their witnesses sworn in court whilst they are there, pay 2*s.* each, enter their names on a piece of paper, and the cause, give it to the crier for that purpose.

Get order of *nisi prius* from Mr. Lowton, King's Bench Walks, Temple, or if at the assizes, of the judge's associate, upon which the arbitrator will appoint a time and place for both parties to meet; and plaintiff's attorney serves a copy of the order of *nisi prius* on defendant's attorney; give arbitrator (if an attorney or counsel) the briefs that were delivered, if not, a copy of the case on each side, and names of the witnesses.

If the arbitrator does not finish in time, you may enlarge the order *by consent* (but first the clerk of the rules will make plaintiff's attorney move, that the order of *nisi prius* may be made a rule of the court); which being done, give brief to counsel, with 10s. 6d. each, and they will sign their hands to same; carry them to the clerk of the rules, and he will draw up rule for the enlargement, pay 6s. the plaintiff's attorney serves copy on defendant's attorney, and an appointment must again be made by the arbitrator, and service thereof made as before. It cannot be enlarged without consent on both sides.

If arbitrator does not make his award in time, may be enlarged.

When the award is made, the arbitrator's attorney gives notice to the attornies, that the same is ready, and that each may have his part on such a day, on payment of his expences.

Awards

How to proceed after Award executed.

If the award is in favour of the plaintiff or defendant, costs are of course given as to the suit by the rule, therefore get an appointment from the master at the foot of the rule of court, to tax the costs; serve copy with appointment on the plaintiff's attorney, and, on attendance, the master will tax the costs, and mark them on the rule; and if the party against whom the award is, does not pay the money, make a copy of the rule of court, and the master's *allocatur* thereon, and also a copy of the award, and let your client the plaintiff first examine copies thereof, then let him deliver the copies to the defendant;

defendant; shew the *original order and award*, and demand the money, *viz.* the sum awarded, and the costs; if he does not pay them, move on the following affidavit for an attachment.

N. B. A letter of attorney may be made for this purpose; but it is too expensive, as there must be an affidavit of the due execution, and the attendance.

Affidavit of service of rule, and allocatur for costs and the demand of the money.

A. B. of, &c. the plaintiff in this cause, maketh oath and saith, That he this deponent, on the day of _____ last, personally served the above defendant with a true copy of the rule and *allocatur*, and also a true copy of the award hereunto annexed, and at the same time shewed him the original rule, *allocatur*, and award, and demanded of him the said defendant, the payment of the sum of 20*l.* awarded, due to this deponent by *W. G.* of, &c. the arbitrator, named in the said award, and also the payment of the sum of 14*l.* for the costs mentioned and allowed to him the said plaintiff in the said cause; but the said defendant refused to pay the same, or any part thereof, and the whole of the said 20*l.* and 14*l.* still remain due and owing from him the said defendant, to this deponent.

Affidavit of due execution of the award to be made by one of the witnesses.

W. T. of, &c. gentleman, maketh oath and saith, That he did see *W. G.* of, &c. sign, seal, publish, and declare his final award and arbitrement between *A. B.* of, &c. merchant, and *C. D.* of, &c. woollen-draper, bearing date the _____ day of _____ 1782: And this deponent further saith, That the name *W. G.* set and subscribed against the seal as the party executing the said award, is of the proper hand-writing of the said *W. G.* and that the names *W. T.* and *J. E.* set and subscribed thereto as witnesses, attesting the execution of the said award, are of the respective hand-writing of this deponent and the said *J. E.*

Cannot arrest on an attachment on a Sunday.

It is settled that an attachment for non-performance of an award is only in the nature of a civil execution, and therefore no arrest can be made on a Sunday; also that the prisoner under such an attachment may take the benefit of the lords act. *The King v. Miners.* 1 Term Rep. 266. *Vide Cowp. Rep.* 136.

When

When there is a Verdict and Bail.

Frequently where there is bail, and a reference is proposed at the trial, the plaintiff, *to prevent the bail being discharged, takes a verdict*, subject to the reference; in that case, when the award is made, if in favor of the plaintiff, he may make his election whether he will proceed or not under the rule of reference, or on the verdict: If he proceeds in the latter, the costs may first be taxed; copy rule and award, serve same and demand the sum awarded, and costs, in the same manner as if he meant to proceed under the rule; and on affidavit of service of the rule, the master's *allocatur* thereon, a copy of the award, and demand of the money, move the court that *the postea may be delivered to the plaintiff, and that he may be at liberty to sign judgment, and take out execution for the money awarded and costs, and that the master may tax the costs of the application*; which being done, draw up the rule as usual with the clerk of the rules, make affidavit of the service, and on no cause being shewn, the court will make the rule absolute; draw up same, and apply to the marshal for the *postea*, who, on producing the rule, will give it to you (*a rule for judgment should be given previous to the motion*); then sign judgment with the master (first stamping the *postea*); get the master to tax the costs, and then take out execution. *Levy for the sum awarded and costs only.*

When bail is taken, and a verdict subject to reference, how to proceed.

1 Salk. 84. Hall v. Master. 1 Vin. 132.

If the award be for a less sum than the verdict, the plaintiff may levy the equitable costs out of the excess.

Proceedings against Justices and Constables.

By stat. 7 Jac. 1. c. 5. If any action shall be brought against justice of the peace, constable, &c. for any thing done by virtue or reason of his office, he may plead the general issue, and give the special matter

May plead general issue, and if a verdict if judge certify, &c. double costs.

matter in evidence, and if such justice, &c. shall have a verdict, he shall have double costs allowed. So if the plaintiff be nonsuit or discontinue. *N. B.* The judge must certify that he was acting in the execution of his office. *Grindley v. Holloway*, Dougl. 307.

If special verdict. But if there be a special verdict, and it appears that the act done was so done by virtue or reason of his office, the master may tax double costs, though no certificate. *Rann v. Pickins*. *Ibid.* 308. in notes.

No writ to be sued against any justice for what he shall do in the execution of his office, till notice given him.

No writ shall be sued against, nor copy of process served, on any justice of the peace, for any thing done in the execution of his office, until notice in writing of such intended writ, &c. shall have been delivered to him, or left at his usual place of abode, or served at least one calendar month before the suing out or serving the same; in which notice shall be contained "the cause of action which the party suing claims to have against such justice of the peace;" on the back of which notice shall be indorsed the name and place of abode of such attorney or agent, who shall be entitled to 20s. for preparation and service of such notice. *Stat. 24 Geo. 2. c. 44. s. 1.*

That he may within one calendar month, tender amends.

That it shall be lawful for such justice of the peace, at any time "within one calendar month after such notice given," to tender amends to the party complaining, or to his agent or attorney; and if not accepted, to plead such tender in bar, together with not guilty, and any other plea with leave of the court; and if on issue joined, the jury shall find the amends so tendered sufficient, then they shall give a verdict for the defendant; and in such case, or in case the plaintiff shall become nonsuit, or discontinue, or in case judgment shall be given for such defendant on demurrer, such justice shall be entitled to the like costs as he would have been entitled to, in case he had pleaded the general issue only; and if the jury find no amends tendered, or not sufficient, and also against the defendant on such other plea or pleas, then they shall give a verdict for the plaintiff, and damages, which he shall recover, with costs. *s. 2.*

If tender sufficient, verdict for defendant.

That

That no such plaintiff shall recover any verdict against such justice, in any case where the action shall be grounded on any act of the defendant, as justice of the peace, unless it is proved upon the trial of such action, that *such notice was given as aforesaid*; but in default thereof, such justice shall recover a verdict and costs. *f. 3.*

Plaintiff not to recover without proof of such notice.

That in case such justice shall neglect to tender amends, or tendered insufficient amends before action brought, he may, before issue joined, pay into court such sum of money as he shall see fit. *f. 4.*

If justice neglect to tender, he may pay money into court.

That no evidence shall be given on the trial of any such action, of any cause of action (*except such as is contained in the notice hereby directed to be given*). *f. 5.*

Evidence not to be given of any cause, but such as is contained in the notice.

That no action shall be brought against any constable, or other officer, or against any person acting by his order and in his aid, for any thing done in obedience to any warrant of any justice, until demand made or left at the usual place of his abode, by the party intending to bring such action, or by his attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected, for the space of *six days after such demand*; and in case after such demand and compliance, by shewing the said warrant to, and permitting a copy to be taken thereof by the party demanding the same, any action shall be brought against such constable, &c. for any such cause, without making the justices defendants, that on producing and proving such warrant at the trial, the jury shall give a verdict for the defendant, notwithstanding any defect of jurisdiction in such justice; and if such action be brought jointly against such justice, and also against such constable, &c. then on proof of such warrant, the jury shall find for such constable, &c. notwithstanding such defect of jurisdiction; and if the verdict shall be given against the justice, that in such case the plaintiff shall recover costs, to be taxed, so as to include such costs as such plaintiff is liable to pay to such defendant

Action not to be brought against any constable, &c. acting in obedience to justice's warrant, till demand made of the copy of the warrant, and refusal thereof, &c.

ant or defendants, for whom such verdict shall be found. *s. 6.*

Where the judge shall certify the cause of action was wilfully committed, plaintiff to recover double costs.

Where the plaintiff shall obtain a verdict, in case the judge shall in open court certify on the back of the record, that the injury was wilfully and maliciously committed, he shall be entitled to *double costs. s. 7.*

Limitation of actions.

No action shall be brought against any justice for any thing done in the execution of his office, or against any *constable, head-borough, or other officer, or person acting as aforesaid*, unless commenced "*within six calendar months after the act committed.*" *s. 8.*

The form of the notice against the justice and constable, to commence an action against them on a distress warrant.

Pursuant to an act of parliament made and passed in the 24th year of the reign of his late majesty king *George the second*, intituled, "*An act for the rendering justices of the peace more safe in the execution of their office; and for indemnifying constables and others acting in obedience to their warrants;*"

Here you are to set forth the cause of action.

This is to give notice that a bill of *Middlesex* is intended to be sued out of his majesty's court of *King's Bench*, against you and one *J. W.* at the suit of *D. M.* in a plea of trespass, for that you and the said *J. W.* on the 28th day of *September*, in the year of our Lord 1791, with force and arms, broke and entered the dwelling-house of the said *D. M.* situate, standing, and being, in the parish of *Christ Church*, in the county of *Middlesex*, and stayed and continued in the said house for a long time, to wit, for the space of six hours; and during that time greatly disturbed the said *D. M.* in the peaceable and quiet possession and occupation of his said house, and seized, took, and carried away the goods and chattels following, to wit, one oval mahogany tea-table (here set forth the goods) of the said *D. M.* of the value of 5*l.* there then found in the said dwelling-house, and converted and disposed thereof to your own use, to the damage of the said *D. M.* of 10*l.* Dated the 23d day of *October* 1791.

To

Proceedings against Officers of Excise, &c.

657

To *A. B.* esq. one of his *W. C.* attorney for
majesty's justices of the the said *D. M.*
peace for the county of
Middlesex.

Mr. J. W.

Whereas on or about the 28th day of *September* 1787, you entered into and upon the dwelling-house of *D. M. &c.* and then and there made distress of, took, seized, and carried away an oval mahogany tea table, the property of the said *D. M.* under colour and pretence of some warrant or warrants of some justice or justices of the peace, empowering you so to do: Now, in pursuance of an act of parliament passed in the 24th year of the reign of his late majesty king *George* the second, for rendering justices of the peace more safe in the execution of their office, and for indemnifying constables and others acting in obedience to their warrants; I do hereby, on the behalf of, and as attorney for the said *D. M.* demand the perusal and copy of all and every warrant and warrants, under and by virtue of which, you entered, seized, and made distress of and carried away the said oval mahogany tea-table as aforesaid.

Notice to the
constable to
demand a copy
of the warrant.

To *Mr. J. W.* of, &c.

W. C. attorney for
the said *D. M.*

Proceedings against Officers of Excise, &c.

By *stat. 23 Geo. 3. chap. 70. sec. 30.* it is enacted, That after the 1st day of *August* 1783, no writ shall be sued out against, nor a copy of any process served upon, any officer or officers of excise, or against any person or persons acting by his or their order, and in his or their aid, for any thing done in the execution of, or by reason of his or their office, until "one calendar month next after notice in writing shall have been delivered to him, or left at the usual place of his abode, by the attorney or agent for the party who intends to sue out such writ or process as

From *Aug. 1.*
1783, officers
not to be sued
for executing
their office until
after a month's
notice.

U u

"aforesaid;"

Particulars to be contained in such notice, "aforesaid;" in which notice shall be clearly and explicitly contained "*the cause of action, the name and place of abode of the person who is to bring such action, and the name and place of abode of the attorney or agent,*" and a fee of 20s. be paid for preparing and serving such notice.

Officers may tender amends, That it shall be lawful for any of the said officers, &c. to whom such notice shall be given, at any time *within one calendar month after such notice shall have been given, to tender amends to the party complaining, or to his or her agent or attorney,* and if not accepted, to plead such tender in bar, with not guilty, and any other plea; and if, upon issue joined, the jury find the amends tendered sufficient, then they shall give a verdict for the defendant; and in case the plaintiff shall become nonsuited, or discontinue, or in case judgment shall be given for such defendant, on demurrer, then such defendant shall be entitled to the like costs as he would have been entitled to, in case he had pleaded the general issue only; and if upon issue so joined, the jury shall find no amends tendered, or not sufficient, and also against the defendant in such other pleas, then they shall give a verdict for the plaintiff, and damages, with costs. *f. 31.*

No evidence of the cause of action to be produced, except what is contained in the notice. That no plaintiff, in any case where an action shall be grounded on any act done by the defendant, shall be permitted to produce any evidence of the cause of such action, *except such as shall be contained in the notice to be given as aforesaid,* or shall recover any verdict against such officer, or persons acting in his aid, unless he shall prove on the trial of such action, *that such notice was given,* and that in default of such proof, the defendant shall recover a verdict and costs. *f. 32.*

Defendant may pay money into court. That in case such officer, &c. shall neglect to tender amends, or tendered insufficient amends, before the action brought, it shall be lawful for him, before issue joined, *to pay into such court, such sum of money as he shall see fit.* *f. 33.*

Limitation of actions. That if any action shall be brought against any person for any matter done by any officer of excise, &c.

Et. in execution of their office, such action shall be brought *within three months next after the cause of action shall arise, and not afterwards, and shall be laid and tried in the county and place where the facts were committed, and not in any other county or place;* and the defendant may plead the general issue, and give the special matter in evidence; and if the plaintiff shall be nonsuited, or discontinue; or if, upon a verdict or demurrer, judgment shall be given against the plaintiff; the defendant shall recover *Treble costs.* *f. 34.*

By stat. 24 Geo. 3. c. 70. it is enacted, That all and every clause, matter, and regulation, contained in stat. 23 Geo. 3. c. 70. touching and concerning any action to be brought against any officer or officers of the excise, or against any person or persons acting by his or their order, and in his or their aid, for any thing done in the execution of, or by reason of his or their office, or any proceeding thereupon, shall be extended to all actions to be brought against any officer or officers of the customs, or against any person or persons acting by his or their order, and in his or their aid, for any thing done in the execution of, or by reason of their office, and to all proceedings in every such action, in as full and ample manner as if the officers of the customs had been named and included in the said act. *f. 35.*

That such action is to be brought *within three months next after the matter or thing done; and shall be laid in the proper county;* and the defendant may plead the general issue, and give this act and the special matter in evidence; and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuited, or discontinue, or judgment shall be given against him, upon demurrer, then defendant shall have treble costs. *f. 39.*

You having on the 12th of March instant, as an officer of his majesty's excise or customs, seized, taken, and carried away a large quantity of snuff, to wit, one hundred pounds weight of rappee snuff, the property of B. C. of, &c. tobaccoist: I do therefore (according to the statute in such case lately

made and provided), as attorney for the said *B. C.* hereby give you notice, that I shall at, or soon after, the end of *one calendar month* from your being served with this notice, sue out of his majesty's court of *King's Bench* at *Westminster*, a certain writ of our lord the king, called a *latitat*, against you for the said trespass; and shall proceed thereon to judgment according to the rules and practice of the said court.

Dated this day of 1791.
 L To Mr. *S. C.* and *A. H.* Yours, &c.

Notices of Motion.

IN many cases I have observed that no notice is necessary where there is to be a rule to shew cause in strictness; yet in some cases, in order to stay proceedings, it may be necessary; therefore I shall give precedents of different notices.

Notice not to
 appear to a writ
 where there is a
 mistake in it.

You having been served with a copy of a *latitat*, at the suit of the above-named plaintiffs *W. C.* and *R. W.* on the day of last, to appear the 7th day of *November* next, by your attorney, in his majesty's court of *King's Bench*, and the said writ not being returnable, I do hereby give you notice not to appear thereto, there being a mistake in the said writ. Dated this first day of *November* 1791. Your's, &c.

To set aside an
 interlocutory
 judgment.

Take notice that this honourable court will be moved to morrow, or as soon after as counsel can be heard, that the interlocutory judgment signed in this cause may be set aside for irregularity, with costs to be taxed by the master, and in the mean time all proceedings be stayed. Dated, &c.

To set aside
 judgment and
 inquiry.

Take notice, that this honourable court, &c. that the interlocutory judgment signed in this cause, and the writ of inquiry executed thereon, may be set aside for irregularity, with costs to be taxed by the master, and in the mean time all proceedings be stayed, &c.

To set aside the
 judgment and

Take notice, that this honourable, court, &c. that the judgment signed in this cause, and the execution

execution issued and executed thereon, may be set aside for irregularity, with costs to be taxed by the master, and that the sum of 50*l.* levied and paid into the hands of the sheriff of *Middlesex*, may be restored to the above-named defendant, and the said sheriff retain the same in his hands, until the further order of this court, and in the mean time all further proceedings be stayed. Dated, &c.

Take notice, that this honourable court, &c. To file common bail. for a rule to shew cause why the defendant should not be permitted to file common bail in this cause, and in the mean time all proceedings be stayed. Dated, &c.

Take notice that this honourable court, &c. To set aside all proceedings for irregularity. to shew cause, why all the proceedings in this cause should not be set aside for irregularity, and in the mean time all further proceedings be stayed. Dated, &c.

Take notice, that this honourable court, &c. To shew cause why it should not be referred to the master to compute the principal and interest due upon the bond in question, and why, upon payment thereof, together with the costs to be taxed by him, the said bond should not be delivered up to the defendant to be cancelled. Dated, &c.

Take notice, that this honourable court, &c. for To shew cause why judgment should not be set aside, and plaintiff answer the matters of the affidavit. a rule to shew cause why the judgment signed in this cause should not be set aside for irregularity with costs, and why the plaintiff should not answer the matters of the affidavit, and in the mean time all proceedings be stayed. Dated, &c.

That this honourable court, &c. why the bail-bond assigned in this cause, and the proceedings thereon, should not be set aside with costs to be taxed by the master, and in the mean time all proceedings be stayed. To shew cause why the bail-bond and the proceedings thereon, should not be set aside.

Take notice, that this honourable court, &c. why the writ of *latitat* issued in this cause should not be quashed, and why the plaintiff should not pay the costs of this application, and that the plaintiff may answer. Why the writ should not be quashed, and answer the matters.

answer the several matters mentioned in the affidavit.

To the sheriff to retain money.

Take notice, that this honourable court, &c. why the judgment in this cause, and the execution executed thereon, should not be set aside for irregularity; and why the money paid into your hands should not be restored to the defendant, and that in the mean time you retain the same until the further order of this court.

Error.

A redress for erroneous judgments is by writ of error.

THE principal method of redress for erroneous judgments in the king's courts of record, is by writ of error to some superior court of appeal; and lies for some matter of law arising upon the face of the proceedings; so that no evidence is required to substantiate or support it; and there is no method of reversing an error in the determination of facts, but by an attain, or a new trial, to correct the mistakes of the former verdict.

Formerly brought for trivial mistakes.

It appears that after verdicts and judgments upon the merits, they were frequently reversed for slips of the pen or misspellings; and justice was perpetually entangled in a net of mere technical jargon. The legislature hath therefore been forced to interpose, by no less than twelve statutes, to remedy these opprobrious niceties: and its endeavours have been of late so well seconded by judges of a more liberal cast, that this unseemly degree of strictness is almost entirely eradicated.

Error lies from inferior courts, &c. in this court.

A writ of error lies from the inferior courts (of a judgment given in a county palatine, *Dy.* 321.; cinque ports; *Wales* in a real action, by stat. 28 *H. 8. c. 3.*; in ejectment, *Mod.* 248.; against a peer attained before the lord high steward, 1 *Lev.* 149.; on a judgment at the sessions of Old Bailey, by commission, 2 *Leen.* 107.; or of a judgment upon the plea roll in chancery, *Dy.* 315.) into this court,

court, and not into the *Common Pleas*. So it lies in this court, of a judgment in the *Common Pleas*.

1 *Roll.* 744. 4 *Inst.* 22. From proceedings in this court, in debt, detinue, covenant, account, case, trespass, or ejectment, originally begun therein by bill; and also on an action *qui tam*^a, it lies to the *Court of Exchequer Chamber*, before the justices of the *Common Pleas*, and *Barons of the Exchequer*; and from thence also to the *House of Lords*. *Stat.*

From this court error lies in the Exchequer Chamber. *a Lloyd v. Skutt. Dougl.* 350.

27 *Eliz. c.* 28. But where the proceedings in this court do not first commence therein by bill, but by original writ sued out of *Chancery*, this takes the case out of the general rule laid down by the statute; so that the writ of error then lies, without any intermediate stage of appeal, directly to the *House of Lords*, the *dernier resort* for the ultimate decision of every civil action, 1 *Sand.* 346. 1 *Sid.* 424.; and upon hearing the matter of law, in which the error is assigned, reverse or affirm the judgment.

If proceedings are by original, error lies in the House of Lords,

From the proceedings on the law side of the *Exchequer*, a writ of error lies into the *Court of Exchequer Chamber*, and from thence to the *House of Peers*. But no judgment given by either are final, save only the *House of Peers*, to whose judicial decisions all other tribunals must therefore submit and conform their own.

It does not lie in the *Exchequer Chamber* on an award of execution on a *scire facias* only, but the writ must also include the judgment in the former action. *Andr.* 287. Nor in a *scire facias* against bail. 2 *Cro.* 171. 384. *Cro. Car.* 300.

This writ of error issues out of the *Court of Chancery*, to authorize the judges to affirm or reverse the judgment given: and all parties against whom judgment is given, ought regularly to join.

From whence the writ issues. Who may have this writ.

3 *Mod.* 134. *Carth.* 7. If judgment be against two, and one brings error, it is bad, even though the other is dead, if it does not appear on record; but if it does, then the survivor may bring error. *Str.* 233. If against three executors, though they

What writ is to describe.

Privy.

Bail.

Against whom it shall be sued.

Nonsuit.

plead separately, all three must join. *1 Wilf.* 88. *2 Str.* 977. But if one makes default, he may be severed. *Mod. Caf.* 40. If two join in error, and one will not assign, the court will give the other time to summon and sever. *Str.* 783. The writ must describe the suit by the *names of all the parties.* *Str.* 682. And a party may have error, though he was not an original party; as tenant by voucher, or rescuit. *1 Roll.* 747. So by him who is privy: as by the heir. *F. N. B.* 21. *2 Cro.* 160. By an executor or administrator. *F. N. B.* 21. So by a privy in estate; as by him in reversion or remainder, after a term for life or years, when determined. *1 Roll.* 748. *Dy.* 16. Tenant in remainder may bring error against a common recovery, where tenant in tail, vouchee, died before the judgment. *1 Burr.* 410. But it must be by such privy as has benefit by the reversal. *1 Roll.* 747. Bail shall not have error of a judgment against the principal, though joined with him. *1 Lev.* 137. *Cro. Car.* 408. 575. It cannot be taken out in the name of the casual ejector. *2 Burr.* 756.

Error ought to be sued against all the parties to the recovery. So against any who was party, or privy to the judgment: and if any who was, has now nothing, yet he shall be named a defendant in error. *F. N. B.* 18.

The common pleas have held it will not lie on a judgment of nonsuit, therefore the court will on motion for liberty to take execution out, grant it. *Vide Box v. Bennett. H. Black. Rep.* 432.

Of quashing Error.

It seems a writ of error may be quashed being brought by *one* defendant *only*, of a judgment against *two*, and laid to the damage of one. *Brewer v. Turner.* *1 Str.* 233. *8 Mod.* 305. *5 Mod.* 338. *Salk.* 319. *2 Str.* 1110. *by this court.*

But will not quash it if brought on a *qui tam* action returnable in Exch.

But where a writ of error was brought on the stat. of usury, returnable in the *Exchequer Chamber*; the

the court held, that this application ought to be made to the *Court of Chancery*, or to the *Exchequer Chamber*, where it is returnable. *Lloyd qui tam v. Skutt. Dougl. 352.* And there it is said on application to the *Chancery*, that court refused to entertain the question, but the court of *Exchequer* held that the writ of error lies to that court.

If an attorney desires time, and says he will not bring a writ of error, notwithstanding which he does, it will be quashed on motion; the court considering it as sued out against good faith. *Cates v. West, 2 Term Rep. 183.* If it bears teste before judgment, it is good. *Vent. 258.*

By 18 *El. c. 14.* After verdict, no verdict shall be stayed or reversed for want of a warrant of attorney, nor for variance or form in any writ, original or judicial, or want of writ original or judicial: but this extends not to indictments. Nor, by 21 *Jac. 1. c. 13.* after verdict, &c. for variance between the original writ or bill, and the declaration, plaint or demand, in form only; except appeals or indictments; nor for want of an averment of the parties life, so as it be proved he or they be in life, or awarding any *venire*, *habeas corpora*, or *distringas* to a wrong office upon any insufficient suggestion; or that the *visne* was misawarded, so as some place is rightly named; or for misnaming any of the jurors in surname or addition; or for want of any return to any of the writs, so as a panel is returned and annexed, or that the officer's name is not set to the return; or by reason that the plaintiff in *ejectione firmæ*, or in any personal action be under age, appeared by attorney, and the verdict passed for him; but this does not extend to actions on penal statutes, felony, &c.

17 *Car. 2. c. 8.* enacts, That in all actions real, personal, or mixt, the death of either party between verdict and judgment shall not be alledged for error; nor for lack of form or other matters, not against the right of the suit, or whereby the issue or trial is altered.

By 4 *Ann. c. 16.* all the stat. of *jeofails* shall extend to judgments on confession, *nihil dicit*, non sum

sum informatus, &c. so as there be an original writ, or bill, and warrants of attorney duly filed.
2 *Mod.* 285.

After verdict no judgment to be stayed for any defect in form or substance, in any bill, &c. or for variance, &c.

By 5 *Geo. 1. c. 13.* After verdict, judgment shall not be stayed or reversed upon a writ of error, for any defect in *form or substance*, in any bill, writ, original or judicial, or any variance in such writs, from the declaration, or other proceedings.
sect. 1.

Within what time to be brought.

Such writ of error to be brought and prosecuted with effect within twenty years. 10 & 11 *W. 3. c. 14.*

If error be brought purely for delay.

If the parties confess that the writ of error is brought purely for delay, the court will interfere, and will not permit them to abuse the forms of justice. Therefore, pending error, an action was brought and rule obtained to stay the proceedings; on shewing cause it appeared that the defendant and his attorney had declared that they would delay the plaintiff as much as possible by bringing error, if he did not comply with the terms proposed. Rule discharged. *Pool v. Charnock. 3 Term Rep. 79.*

If parties are to be restrained from bringing error, then legislature must interfere.

But where in a like motion it was shewn by plaintiff's attorney, that he offered to waive the judgment, if the attorney for the defendant would point out any error, which was refused; Lord *Kenyon* said, that the rule must be absolute. If it were fit that parties should be restrained from bringing writs of error, the legislature must interfere. But by the constitution of this country, every subject has a right to have his cause reviewed by a court of error. In this case perhaps the defendant's attorney might not know whether there was error or not. *Christie v. Richardson. 3 Term Rep. 79.*

In what cases bail is to be given in error, or execution may issue.

If error be brought *after verdict*, he that brings it must find substantial bail, according to the statute of 3 *Jac. 1. c. 8.* which enacts, That no execution shall be stayed by any writ of error, to be sued for the reversing of any judgment given in any action or bill of debt, upon any single bond for debt, or upon any obligation, with condition for payment of money only,

or upon any *action* or *bill of debt for rent*, or upon any *contract* sued in any court of record at *Westminster*, &c. unless such person, with two sufficient sureties, shall first be bound unto the party for whom such judgment is given, by recognizance to be acknowledged in the same court, in double the sum adjudged to be recovered by the said former judgment, to prosecute the said writ of error with effect; and also to satisfy and pay (if the said judgment be affirmed) all and singular the debts, damages, and costs adjudged upon the former judgment: and all costs and damages to be also awarded upon the delaying of execution.

By the nature of this recognizance the bail cannot render to prison the plaintiff in error in discharge of themselves, though he become a bankrupt, nor are they intitled to relief. 1 Term Rep. 624. *Southcote v. Braithwaite* Cannot render.

No execution shall be stayed in any of the courts of *Westminster*, &c. upon any writ of error, after verdict and judgment in any action of debt on the statute 2 Ed. 6. for not setting forth of tithes; nor in any action upon the case upon any promise of payment of money, actions sur trover, covenant, detainue, and trespass, unless such recognizance shall be first acknowledged. 13 Car. 2. s. 9. No execution to be stayed on 2 Ed. 6. nor that, unless bail; nor action on the case, &c.

Sett. 11. provides, That it shall not extend to actions popular, or on penal statutes, indictments, &c. other than the statute of Ed. 6. Not to extend to popular actions.

By 16 & 17 Car. 2. c. 8. s. 3. "No execution shall be stayed after verdict and judgment in any personal action whatsoever, unless a recognizance be entered into according to the 3 Jac. 1. c. 8." No execution to stay after verdict, in any action personal, unless bail.

This does not extend to any writ of error to be brought by any executor, &c. nor to any action popular or penal (except debt for tithes). Sett. 5. Not to extend to executors.

That in writs of error on any judgment after verdict, in dower, or *ejectione firmæ*, no execution shall be stayed, unless the plaintiff shall be bound in such reasonable sum as the court shall think fit; with condition, that if judgment shall be affirmed, or the writ be In dower and ejection, bail to be given by plaintiff himself.

be discontinued, in default of the plaintiff therein; or that the said plaintiff be nonsuit, that then the plaintiff shall pay such costs, damages, and sums of money, as shall be awarded after such judgment affirmed, discontinuance or nonsuit had. *Sec. 3.*

Two years value.

A recognizance in error in ejectment ought to be in the value of two years rent due. *Vide 4 Burr. 2501. Barnes 103. and double costs. Ibid.*

Two sureties, if he please.

The defendant may give two sufficient sureties if he please in ejectment.

Executors, where the judgment is *de bonis propriis*, must put in bail.

If judgment be against an executor or administrator *de bonis propriis*, and he brings error, he must put in bail, and pay costs on affirmance; but if judgment be *de bonis testatoris* only, he shall neither put in bail nor pay costs. *1 Lev. 245. 1 Sid. 368.*

In error on judgment in debt on bond, bail bound in the sum recovered, it being double the sum due,

On a judgment in debt on a bond in the penalty of 147*ol.* it was moved to justify bail, each in 147*ol.*; on the other side it was insisted, that the bail ought each of them to justify in double the sum the judgment was given for; but *per curiam*, The sum recovered is double the debt really due; and it is sufficient for the bail to justify in 147*ol.* *1 Wils. 213. Moor v. Lynch.*

Bonds that require bail.

There must be bail on a *bottomry bond*, *Str. 476.*; on a *second writ of error*, *ibid. 527.*; also on a bond given for the payment of 500*ol.* being the sum mentioned in certain indentures, *ibid. 959.*; on bond for 300*ol.* mentioned in a surrender of a copyhold, by way of mortgage, wherein judgment had passed by default, *Barnes 78.*; upon a bond conditioned to pay so much as I shall appoint. *1 Lev. 117.* A bond given by *A.* to *B.* to pay a sum certain (the debt of *C.*) by instalments, the last whereof is still future, is an obligation for payment of money only, and within the stat. *2 Burr. 746. Chauvet v. Alfray.*

Bonds that require no bail.

But not on a bond for performance of covenants, *Barnes 72.*; nor if conditioned to pay for so much beer as should be delivered to *S.* not exceeding 100*ol.* after judgment upon demurrer, *Str. 1190. 1 Wils. 19.*; nor upon a bond for performance of an award,

or

or on an obligation to indemnify; agreed by counsel on both sides. *Com. Rep. 322.*

Error on a bond, conditioned that *W. G.* was bound with the defendant, for his debt, by bond of the same date, to pay 5*l.* 10*s.* to *Lat. Ridley*, 30th October, in discharge of the recited obligation; it was held that bail ought to be given. *Comyn's Rep. 321. Huddy and Ux. v. Gifford.*

Bail shall be given in an action of debt on the judgment against the principal, notwithstanding a writ of error, if no bail in the original action, otherwise not. *Com. Rep. 556.*

Bail shall be given in debt upon the judgment, though a writ of error is brought.

But bail is not requisite on bringing a writ of error on judgment in an action of debt, founded on a prior judgment. 3 *Burr. 1545. Biddleston v. Whytel.* Nor on judgment in an action of debt upon a recognizance of error. *Ibid. 1565.* It does not appear this was determined.

When not requisite.

How to sue out a Writ of Error upon a Judgment in the King's Bench by bill, returnable in the Exchequer Chamber.

Make a *præcipe* for the curfitor as follows: *Mid-præcipe, dilex, writ of error for C. D. at the suit of A. B. on a judgment in case (on verdict, or on inquiry, as the case is, to the damage of the said A. B. of 100*l.*) given in the King's Bench by bill, returnable.*

J. K. attorney.

Take this to the curfitor of the county in which the venue is laid (whose office is the corner of Curfitor-street, Chancery lane), he will make out same by private seal or otherwise; pay, without private seal, 1*l.* 2*s.*; 8*s.* 6*d.* more if a private seal; when sealed, take it to Mr. Parry's office Tanfield Court, Temple, who will make out a note of allowance on a piece of paper, pay for same 2*l.* make a copy, serve it on the attorney for the plaintiff in the original action, and at the same time shew him the original, and from that time it is a *superjedeas* of all proceedings in

Where to take the præcipe, and how to get error allowed.

Allowance a
superfedeas from
the time.

When writs of
error returnable
in exchequer
shall be delivered
to the clerk of
the errors.

in the *original action*, provided it be regularly followed up.

All writs of error, returnable before the justices of the common bench and the barons of the exchequer chamber, shall without delay be delivered to the clerk of the errors for the time being; and that no person shall be bound to forbear suing out execution, on pretence of any such writ of error, before the writ shall be delivered to the clerk of the errors. *R. E. 36 Car. 2.*

Within what time Bail to be put in.

Bail to be put
in within 4 days.

In cases where special bail is required, unless the plaintiff upon such writ of error shall, *within four days after the delivery thereof to the clerk of the errors*, put in bail according to law, the defendant may proceed to execution, notwithstanding such writ. *R. E. 36 Car. 2. Vide E. 16 Car. 2.*

When it is a
superfedeas.

Judgment signed 30th *April*, plaintiff sued out a *fi. fa.* 3d of *May*, a writ of error was allowed and served on the agent, and on the under-sheriff the 5th of *May*; the sheriff entered the same day, but after the service of the allowance: No bail in error was put in. Rule why *fi. fa.* executed, should not be set aside for irregularity, discharged. *Ashurst J.* If the writ of error had been followed up immediately by the plaintiff in error regularly putting in bail, it would have operated as a *superfedeas*, but no bail having been put in, the writ of error became a nullity, therefore no foundation for the application. *Lane v. Bacchus, 2 Term Rep. 45.*

Bill to be put in
within 4 days
after final
judgment signed,
without refer-
ence to the time
of allowance, or
serving copy.

On 25th *May* a verdict was given for the plaintiff; a writ of error was allowed on the 31st. The same day a copy of allowance was served; final judgment was not signed till 14th of *June*, and execution issued same day; within 4 days after which bail was put in. The question was, if the allowance and service, was a *superfedeas*; and on motion to set aside the execution, *Buller J.* said, As to the practice which has been obtained in suing out

out a writ of error *before judgment signed*, it happens in almost all cases that the writ is *sued out before judgment* is actually signed; because otherwise execution would issue instantly: and the court have gone so far, that if a writ of error is sued out, and the plaintiff will not sign judgment, till after the return of the writ, in order to avoid the effect of it, and then sues out execution, the court will set it aside. The allowance of a writ of error, in the general course of practice, is not served till final judgment is actually signed; and the words of the rule apply to that. The rule requires bail to be put in *within 4 days after the allowance*; but there is no opportunity of putting in bail, before judgment is signed. As to the defendant being too soon in serving the copy of the allowance, it makes no difference, for it only operates as an allowance from the time of signing judgment. The service of the allowance, is only material to bring the party into contempt, if he proceeds to sue out execution afterwards; for the allowance of the writ of error is of itself a *superfedeas*. Rule absolute. 1 *Term Rep.* 279. *Jacques v. Nixon*.

Service of allowance is to bring party in contempt.

A writ of error being allowed (and bail given, when bail is required) it shall be a *superfedeas* of any subsequent execution. 1 *Salk.* 321. It is a *superfedeas* if allowed, though sued out before judgment. *Morsfoot v. Chivers.* *Str.* 631. And no contempt is incurred by taking out execution till after notice.

If the execution is executed *before error allowed*, or notice, there shall be no restitution. 1 *Salk.* 321.

How to put in Bail.

Take the names of the bail and additions, on a piece of plain paper, to the clerk of the errors, who will enter them in his book; appoint him to meet you at the judge's house or chambers for the purpose; bring the bail, and then he will take the recognizance; pay him at chambers 1*l.* 5*s.* 6*d.* at *Westminster* 3*s.* 4*d.* more; notice must be given to plaintiff's

How to put in bail.

plaintiff's attorney of their being put in, pursuant to *R. M. 5 W. M.*

In Error.

C. D. against A. B.

Notice of bail.

Cannot be taken
before a com-
missioner.

Take notice that special bail was this day put in upon the writ of error brought in this cause, with the clerk of the errors, before the honourable Mr. Justice Buller, at his chambers in *Serjeant's Inn, Chancery Lane, London*, and their names are *J. K. of, &c. chymist*, and *G. H. of, &c. baker*. Dated, *&c.* Yours, *&c.* *G. H.* attorney for plaintiff in error. To Mr. *A. K.* attorney for the defendant.

The plaintiff has *four clear days* to put in bail in error after signing of the judgment. *Monday* the judgment was signed, *Friday* execution taken out, held bad, for execution ought *not* to have issued till *Saturday*. *Bennet v. Nicholls. 4 Term Rep. 121.*

Of excepting to the Bail.

How exception
to be entered.

If the bail are not approved of, the defendant in error may have a rule for better bail, which is obtained at the clerk of the errors; serve a copy, and if the bail do not justify, or better bail be put in *within four days after notice of the rule*, the plaintiff in the original action may take out execution; but the writ of error still remains, and the plaintiff in error may proceed on his writ, to reverse the judgment notwithstanding.

Exception in
twenty days.

If the defendant shall not except to the bail for *insufficiency* thereof *within twenty days next after notice thereof* given to him or his attorney, then such recognizance shall be allowed. *R. M. 5 W. & M.*

When to justify.

If a rule for better bail be served in vacation, you have no occasion to justify, until the next term, though the practice is otherwise in the *Common Pleas*.

Same notice to
justify as in
other cases.

The same notice is allowed to justify in error, as in common cases, *viz.* if they be the same bail as were put in to justify, then *Monday* for *Tuesday* will do; if added bail, then two days exclusive; and the common notice for justification will do; bespeak the

the book to go to * *Westminster* ; make affidavit of the * *Serjeant's Inn* service; give counsel brief to move to justify, *Hall*.
 10s. 6d. ; clerk of the errors 13s. 4d. if at chambers
 10s. only, if in vacation 2s. more for the judge's
 clerk; officers of the court 9s. 6d. Rule for al-
 lowance of the bail must be drawn up at the clerk of
 the rules, and served.

Of the Rule to transcribe.

The bail being complete, search when the writ of error is returnable (if no bail is required, this step is the first that defendant's attorney in error takes); if it is returnable in the same term the allowance is made, then proceed by giving a rule (which you get at Mr. Parry's office) for the plaintiff in error to transcribe, which rule expires in eight days after service, pay for it 2s. ; serve attorney with a copy.

After service, make a copy of all the proceedings, and leave them with Mr. Parry, who makes the transcript therefrom, or leave the original papers with him; file your bill the same term the declaration is of, with the clerk of the declarations.

Of Amendment.

On a writ of error, the King's Bench sends only the transcript to the Exchequer chamber, and therefore the transcript must be brought back to the King's Bench to be amended by the original record.
Str. 837. Rutter v. Redstone.

After a copy of the proceedings is left, the clerk of the errors sends for the transcript money, which being paid, he makes up the transcript of the record, and when ready, either gives it to the attorney for the defendant in error, or to Mr. Edge, in order to go to Westminster to be examined (the attorney attends there for that purpose). If the clerk of the errors neglects his duty, the clerk of the treasury is to do it for him. *R. T. 20 Car. 1.*

X x

Of

Of the Action on the Judgment pending Error.

If the plaintiff brings an action on the judgment pending a writ of error, and he has obtained judgment for want of a plea and execution on it, the court will on application stay the proceedings, as it would be unreasonable that the plaintiff should proceed in execution of a judgment which would of course fall to the ground, in case the original judgment upon which it was founded should be reversed, and restrain also the defendant from bringing a bill in equity. *Taswell v. Stone.* 4 Burr. 2454.

On motion to stay proceedings pending error, it was sworn that defendant had acknowledged that the writ of error which had been depending two years was for delay. Court ordered, that upon the defendant's confessing judgment in this action and undertaking to bring no writ of error thereon, execution should be staid till the determination of the writ of error. And court said, that they could not make him undertake to waive his right in that respect. *Gribble v. Abbot.* Cowp. Rep. 72.

Error on a judgment in C. P. afterwards error in parliament, they nonprossed the first writ of error and motion to stay the proceedings in an action on the judgment pending the second writ. *Buller J.*—It appears by the defendant's own conduct, that the writ of error has been sued out without any foundation for it. Rule discharged with costs. *Entwistle v. Shepherd.* 2 Term Rep. 78.

The defendant in error cannot transcribe the record. 1 Wils. 35.

N. B. If the transcript is not examined in term, you will have the keys of the treasury to pay extra 5s. 10d.

After made up and examined, to be delivered over to clerk of the errors in Exchequer,

After the transcript is examined and complete, the clerk delivers over the same to Mr. Poole, who is the deputy to Philip Fonnerau, Esquire, the clerk of the errors in the Exchequer chamber. In this term,

term, which is the second, defendant's attorney in error applies to Mr. Poole, for a rule to alledge *diminution*, which is to be done *in eight days after service*, or a nonsuit may be entered; pay 8*d.* *per folio*, and 2*s.* 4*d.* for rule; serve a copy on the plaintiff's attorney, who must call at Mr. Poole's office, which is at Mr. Justice Heath's chambers, and pay the sum demanded; if not, he will require an affidavit of the service of the rule to be tendered to him (provided the attorney for defendant in error insists on a *nonpros* before he sends to plaintiff's attorney), before he signs a *nonpros*. But if he sends, and there is no answer the next morning, he will sign *nonpros* of course, and tax the costs.

Rule to alledge
diminution.

Of alledging Diminution.

The writ of diminution is not an original writ, but issues out of the court where the writ of error is depending; and after diminution is alledged, a *certiorari* issues, whereby the thing is certified. *Cro. Jac.* 130. If the whole record is not certified, or not truly certified, the party injured may alledge a diminution of the record, and cause it to be rectified. But no diminution can be alledged on records out of inferior courts, *Sid.* 40. but the court may award a *certiorari ad infermandum conscientiam*. Errors cannot be entered until the *certiorari* of diminution alledged, and the rule to assign errors is out.

Diminution.

Rules to assign Errors.

If the plaintiff in error alledges diminution, then in the next term get a rule from Mr. Poole to assign errors (pay 2*s.* 4*d.*), which expires in 8 days next after service. Serve plaintiff's attorney with a copy. The common errors, which are best and cheapest, are prepared by Mr. Poole, pay him 8*s.*; but if *special*, then the plaintiff's attorney draws the assignment;

Rule to assign
errors.

X x 2

pay

pay counsel 10s. 6d. ingross same on a treble penny paper, and file same with Mr. Poole.

Who are to join
in assignment of
errors.

All the plaintiffs must join in assignment of errors; for an assignment by one is a discontinuance, 2 Cro. 94. except where the others are severed. Mod. Caf. 40. So they must be assigned in term, and not in vacation. Sty. Pract. Reg. 241. After *in nullo est erratum*, assignment of general errors shall not be amended. 2 Mod. 304.

Of the Writ of Certiorari.

Certiorari, when
necessary.

When, upon error, the original imparlance, warrant of attorney, or other part of the record, is not returned, the plaintiff in error may alledge diminution, and have a *certiorari* for the part not returned. 1 Salk. 267. If a different original is returned, the defendant may alledge diminution, and return a true original. 2 Cro. 130. Cro. Car. 91. So if want of original, &c. be assigned for error, the defendant in error may alledge diminution, and have a *certiorari*. 1 Salk. 267. The court may take notice that the record is imperfect, and award a *certiorari*, for their own satisfaction, before errors assigned. Str. 440. So may award a *certiorari* to bring the original before them, *ad informand. conscient. cur.* though no diminution is alledged. Rep. temp. Hard. 118. So in all cases the court may award a *certiorari* for any part of the record not returned or mistaken; for though the party is estopped by plea of *in nullo est erratum*, the court will not be. 1 Salk. 270. If return is made that there is no such writ in the office, and a second *certiorari* issue, and return made that there is such a writ, the second return shall be taken. Ld. Ray. 1476.

Of what Term the Original is to be.

Of the original
writ.

When all the proceedings are in one and the same term, an original in that term will warrant same; but

but an original of the term final judgment is given, will not warrant that judgment, if it appear upon the same record that there have been proceedings of a preceding term. 1 Wils. 181. *Dyke v. Sweeting*. It is sufficient if a warrant of attorney be filed at any time pending the suit.

Of arguing the Errors.

The next term, being the fourth, the defendant in error (if general errors are assigned) may plead Setting down for argument. *in nullo est erratum*, which is done by informing Mr. Poole the first day of the term; he also sets down the cause, pay 9s. 6d, and moves to affirm the judgment. N. B. You may now apply for interest to be added in the Exchequer chamber, but such application is made by special motion. Wait four days after affirmance (exclusive), then apply to Mr. Poole to tax the costs; pay according to the length of the pleadings; when the costs are taxed, issue out execution, but before it is returnable, apply to him for the transcript and file, which take to the King's Bench Treasury, and pay 2s. 6d.

In case there are real errors assigned, draw a join- Real errors, der, engross and file it with Mr. Poole, then pursue the following rule:

It is ordered that no copy of error and record thereupon be delivered to the justices or barons, before the attorney for the plaintiff upon the writ of error shall give ten days notice to the clerk of the errors in the Exchequer chamber, that the error assigned in the record is to be argued before the said justices and barons for both parties, and that the attorney for the plaintiff shall deliver four copies to the justices of the Common Pleas, and the attorney for the defendant shall deliver four other copies to the barons of the Exchequer, four days before the hearing the cause. R. E. 33 Car. 2.

When copies of error and record are to be delivered to the judges of the Common Pleas and Exchequer.

In this case Mr. Poole makes a copy of the proceedings in error for both parties, so as to enable them to make copies, and deliver to the justices How to proceed if cause to be heard.

X x 3

pursuant

pursuant to the above rule; the cause is set down by Mr. Peole without motion for a *concilium*; pay 9s. 6d. and give copies to counsel. If the plaintiff in error does not set them down, the defendant may; if the judgment is affirmed, the costs are taxed by Mr. Peole four days after, exclusive; and then sue out execution.

Of the Days for hearing of Errors.

Of the days for
hearing causes
in Exchequer
chamber.

The exchequer chamber is a branch of the court of Exchequer, in which there are no more than two return days in every term: one is called the *general affirmance day*, being appointed by the judges of the Common Pleas, and barons of the court of Exchequer, to be held a few days after the beginning of every term, for the *general affirmance* or *reversal of judgments*. The other is called the *adjournment day*, which is usually held a day or two before the end of every term; and on the first of these days, judgments are affirmed, or reversed, or writs of error nonprossed. The intent of the latter is, to finish such matters as were left undone at the former; on which last day also (as well as on the first) judgments may be affirmed, or reversed, or writs of error nonprossed, on paying 16s. extraordinary to the clerk of the errors, and setting down the cause for affirmance *two days before the adjournment day*; the clerk of the errors charging 9s. 6d. for every cause set down for the general affirmance day, and 14. 5s. 6d. for the adjournment day.

Error cannot be assigned contrary to the record; if it is, judgment must be affirmed. 1 *Wils.* 85. *Bradburn v. Taylor.* *Str.* 684. *Ld. Ray.* 1414.

Common assign-
ment of errors in
the Exchequer
chamber,

Afterwards, to wit, on the next after in this same term, comes the said R. C. by J. F. his attorney, and says, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said

said *A. B.* to have and maintain his aforesaid action thereof against the said *R. C.* There is also error in this, to wit, that by the record aforesaid, it appears that the judgment aforesaid, in form aforesaid given, was given for the said *A. B.* against the said *R. C.* Whereas, by the law of the land, the said judgment ought to have been given for the said *R. C.* against the said *A. B.* And the said *R. C.* prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

W. Baldwin.

Certiorari.

George, &c. To our trusty and well beloved *Certiorari* to certify diminution of bill, bail, and warrant of attorney.
Lloyd lord Kenyon, our chief justice assigned to hold pleas in our court before us, greeting. Because in the record and proceedings, and also in the rendition of the judgment, of a plea which was in our court before us by bill, between *A. H.* and *J. G.* of a plea of trespass on the case, it is said, manifest error hath happened, to the great damage of the said *J.* as by his complaint we have understood; the record and proceedings of which said judgment we have lately caused to be brought before our justices of our common bench, and our barons of our exchequer, of the degree of the coif, to correct the errors in the same, according to the form of the statute in such case made and provided, in the chamber of our exchequer aforesaid; and the said *J.* appearing in the same exchequer chamber hath said, that whereas by the record aforesaid sent to the same justices and barons it appears, that the said *A.* in *Trinity* term, in the 31st year of the reign of his present majesty, exhibited into the said court of our said lord the king, before the king himself, her bill against the said *J.* in the plea aforesaid, and that the said *J.* was in the custody of the marshal of our

To be engrossed on a ros. stamp parchment signed with Messrs. *Provoost* and *Webb*, and seal it.

X x 4

Marshalsea

Marshalsea before us; nevertheless the said *J.* at or before the time of exhibiting the bill of the said *A.* was not in the custody of the marshal of our *Marshalsea* before us: neither was any bail ever filed for him in the said court; nor any such bill, and the continuances thereon, indorsed in our said court, of the same term, before us of record remaining. And that whereas by the record aforesaid so as aforesaid sent, it also appears that the said *A.* constituted one *R. F.* her attorney against the said *J.* in the plea aforesaid; nevertheless the said *J.* hath said that the said *R. F.* had no warrant of attorney thereon on record filed; and we being willing to be certified of the premises aforesaid, in this behalf, command you that the files of the bails of the county of *Middlesex*, and of the bills in the said *Trinity* term in the 31st year aforesaid, in your custody, and also the rolls and other memorandums of the warrants of attorney of the same term, in your custody of record likewise remaining, being searched, what of the said bail, bill, and continuances thereon indorsed, and warrant of attorney aforesaid, you shall find, to our justices and barons aforesaid, immediately into the chamber of our exchequer aforesaid, you certify, together with this writ. Witness *Alexander* lord *Loughborough*, &c.

N. B. Writs issuing out of the exchequer chamber, are always witnessed by the chief justice of the common pleas.

The like writ will issue where there is the want of an original assigned for error (which see in Error from *C. P.* to *K. B.*); only vary it by this precedent.

As to Interest being allowed against Bail.

In debt upon a recognizance of bail in error in *Exchequer Chamber*, the bail are not liable to interest between the

The plaintiff recovered a judgment in *Hil. Term* 1784, for 800*l.* the defendant brought error in the *Exchequer Chamber*, and put in bail. In *Nov.* 1785, judgment was affirmed, and an action of debt was brought against the bail in same term, and plaintiff recovered.

recovered. The bail required indulgence, and granted. The question was, whether the plaintiff was intitled to interest from the bail on the sum recovered between the time of signing the judgment in the *K. B.* and the affirmance in the Exchequer, as interest for the whole time, since the time of signing the final judgment, had been levied against the bail. *Buller J.* This is not an application to a court of equity, but to a court of law, to enforce the performance of an engagement which the bail have entered into. The recognizance they entered into is with a condition, that the defendant in the original action shall prosecute his writ of error, and that if judgment should be affirmed, they will pay the debt and costs upon the former judgment, together with such costs as are occasioned by the delay. So that the bail in express terms only promise to pay what was due upon the original judgment, and the costs given in the *Exchequer Chamber*; therefore we are not warranted in giving any more. In *Bodily v. Bellamy*, 2 *Burr.* 1094. It is laid down, that when final judgment is given by the court, the demand is liquidated and no interest can be computed after that time. In *Wilford v. Davison*, 4 *Burr.* 2127, it was held, that on affirmance of judgment in error, bail are not liable for more than they have undertaken to pay; namely, the debt and costs which have been adjudged due. As to interest due subsequent to the time of the affirmance, that stands on a different ground; because when the judgment is affirmed, it becomes, from that time, the debt of the bail; and if an action were brought on that judgment, the jury might give damages for the detention of the debt, so as to include interest up to the time of final judgment. *Frith v. Leroux & an.*, 2 *Term Rep.* 57.

Error from the Common Pleas into the King's Bench.

5 Ed.

Original to be
bespoke before
the effoign day
of the succeed-
ing term.

THE method of proceeding to obtain this writ, &c. is particularly stated in my *Instructor Clericalis* in the Common Pleas, from p. 705 to 711. therefore it is unnecessary to insert the proceedings here (except after the transcript is delivered over).

No curfitor shall make any original writs of any return past, unless he receive instructions *within the term wherein they are to be returnable*, or at farthest *on or before the effoign day of the next succeeding term*, without warrant from the lord chancellor or master of the rolls. *Lord Clarendon's Orders in Chancery.*

The proceedings shall not be stayed because the chief justice has not signed the return. *Str. 1063. Blackwood v. South Sea Comp.*

May be amend-
ed.

A writ of error may be amended, and made agreeable to the record, by the court where the writ of error is returnable. *Rep. temp. Hard. 194. 5 Geo. 1. c. 13.*

Trespass brought
against two and
verdict against
one. Error
brought by the
two, and amend-
ed by striking
out the other's
name.

Plaintiffs in this case were plaintiffs in error on a judgment in *C. B.* in an action brought against them in that court jointly. But judgment was given against *Verelst* only; *Smith* being found not guilty. Motion to quash the writ, because brought by them jointly, whereas it ought to have been brought by *Verelst* only. *Wallace*, on the other hand, moved for leave to amend the writ of error, by striking out the name of *Smith*, on an affidavit made by the office that it was his mistake. Both rules came on together; 2 *Str. 892.* was cited and in point. The rule to amend the writ of error was made absolute, the other discharged. *Verelst Esq. & an. v. Rafail, Cowp. Rep. 425.*

How to proceed
when transcript
carried over.

The transcript being carried in and filed with Messrs. *Provost* and *Webb*, the parties order copies to be made, pay 4d. per sheet, and the defendant in error may sue out his *scire facias quare executionem non* immediately, and also *alias*, if the first be returned
nihil,

nihil, directed to the sheriff of the county where the cause of action is stated to arise.

The copy of the transcript is necessary to be taken on the part of the *original plaintiff*, because otherwise he cannot enter his proceedings on the rule, or tax his costs without producing it. Copy to be taken of the proceedings.

This writ is made returnable on a general return day, wheresoever, &c. if the *original proceedings* were by *original*; but if by *bill* or *attachment*, in that case the *sci. fa.* must be returnable on a day certain, for it ought to pursue the nature of the *first process*, *Eden v. Mills*. 1 *Str.* 694. and if the transcript be brought in before the *essoign day* of any term, may bear *teste* the last day of the preceding term; and if brought in within the term, the first day of the term, and 15 days between the *teste* and return of both, will do. The *alias* cannot issue before the return of the first *sci. fa.* and to be tested the *quarto die post* of the first, *Salk.* 599. 6 *Mod.* 86. if proceedings by original; if by bill on the return day. Sci. fa. to be returnable on a general return day, where the proceedings are by original, aliter if by bill or attachment.

The writ of *sci. fa.* is to be engrossed on a 2s. 6d. stamp, signed by Messrs. *Provoost* and *Webb*; a *præcipe* is to be made, pay him 1s. 8d. seal 7d. take it to the sheriff's office; if a *nihil* is returned, pay 1s. each name; if left for a *scire feci.*, he makes out a summons to his bailiff, pay 2s. 4d. officer 5s. return 2s. each defendant's name. If there be 2 *sci. fa.*'s, the last need not lie four days in the office before the return, nor for a *scire feci.* 3 *Burr.* 1723. *Miller v. Yerraway.* To be engrossed and left for return.

On the return day of the *scire facias*, if the defendant is warned, or upon a *nihil* returned on the *alias*, give a rule thereon at the clerk of the rules, on a piece of plain paper thus: *In error*, "C. D. against A. B. rule on *sci. fa.* J. A. attorney;" pay for same 1s. 10d. which expires in four days, exclusive of the day given (Sunday, and no court day, excepted); at same time get the master to give a rule to assign errors, enter it with the clerk of the rules, pay 1s. 10d. serve a copy on the opposite attorney, and both rules will expire on On return to give rule for judgment.

on same day. In this case, if there is no assignment of errors left with defendant's attorney in error, he may *nonpros* the error, and take out execution : but if a rule should not be given to assign errors, he cannot *nonpros* the writ. 3 Burr. 1772. *Leith v. Mac. Ferlan.*

Rule on *sci. fa.* and to assign errors, may both be entered on same day, being both consistent, and only to compel an assignment of errors.

Rule to certify, served 18th May in Easter term, the record certified before the first day of Trinity, the defendant after the record was certified, and three day before said Trinity term, sued out a *sci. fa. quare executionem non*, tested the last day of Easter term, returnable the first day of Trinity term, and notice given on the return day. Same day a rule to appear was given to the *sci. fac.* and plaintiff in error was also on same day served with a rule to assign errors. Motion to quash the *sci. fa.* for irregularity on two grounds: First, That the record should not have been certified before the first day of the present term ; till which time the *scire facias* should not have been issued. Secondly, That the rule to assign errors should not have been given before the rule to appear expired. Buller J.— The proceedings are regular on both grounds. As to the first, the record was brought into this court in the vacation ; then it remains as a transcript of the last term. It is not necessary that the officer should have eight days allowed him to transcribe the record ; “ it is his duty as an officer of the court to transcribe as soon as he can.” And though eight days are mentioned, which he is not to exceed, yet if he can certify the record in less time, he should do it. As to the second, there is no ground, for it is an irregularity ; the two rules are consistent, being both for the same purpose, which is to compel an assignment of errors. *Sambidge v. Housley*, 2 Term Rep. 18. Rule discharged. *Vide Leon. Rep.* 107.

If no assignment, then how to proceed.

If the plaintiff in error delivers no assignment of errors on the expiration of the rule given, the defendant must enter all the proceedings on the roll, beginning with the transcript, as of the term the transcript is of, sign judgment thereon at the king's bench office

on a double half crown stamp, tax costs with the master, and sue out execution.

Of assigning Errors.

Few parties after transcript suffer the writ to be nonprossed, especially if real errors exist, but will assign errors, which is signed by counsel, engrossed on a treble penny paper, and delivered over to the opposite attorney. If assignment, how.

If the errors assigned are for want of an original warrant of attorney, &c. then it lies on the defendant to force the plaintiff to return the writ of *certiorari*, which is done by application to the master, who will give the rule on the back of the draft of *sci. fa. quare executionem non*, which must be entered by the clerk of the rules, pay 1s. 10d. serve copy on the plaintiff's attorney. 1 Salk. 267. If want of original assigned, how to proceed.

The plaintiff's attorney on service of this rule must make out the *certiorari*; sign it with Messrs. *Provost and Webb*, pay 1s. 8d. seal 7d. and leave it with the *custos brevium* of the common pleas to certify; when returned, it is to be filed with the clerk of the treasury at *Westminster*. The defendant's attorney searches for it there, and if returned, speaks a copy of it. Certiorari to be made by plaintiff.

If the *certiorari* is not returned and filed by the time appointed by the rule, the benefit of it is lost, 1 Salk 267. and the defendant may join in error, by pleading *in nullo est erratum*, and enter a *non misit breve* on the record, without taking any notice of the diminution; and the assignment of error, as to that part, is void. If not returned, how to proceed.

Of Joinder in Error and Argument.

If special errors assigned, defendant must get a joinder drawn, which need not be signed by counsel; engross and deliver the same over on treble penny to the plaintiff's attorney; but if general, he need only deliver on treble penny, the joinder of *nullo est*. If errors are spec. al.

est

est erratum, and at the same time pay the plaintiff's attorney 2s. 4d. for entering same on record.

After joinder,
how to proceed.

After joinder either party may move the court for a *consilium* (counsel), 10s. 6d. the rule must be drawn up at the clerk of the rules, pay 4s. and the proceedings are to be entered on the roll, as of the term the transcript is of; Mr. *Austin* will mark the roll, and enter the cause for argument, as on demurrer; serve copy of the rule on the opposite attorney, docket the roll at the *King's Bench* office, and file it in the treasury.

Of the Entry on the Roll.

Entry.

The whole proceedings are to be entered on *King's Bench* rolls the term the transcript is of, beginning with the writ of error, to the end of the final judgment in the C. P. then add the assignment of errors and joinder; make copies of the whole proceedings as on the roll for the judges, the same on a demurrer. At the top of the roll write *As yet of* Term 31 Geo. 3. *Witness, &c.*

The plaintiff is to deliver two copies to the chief justice and senior judge, the defendant two other copies to the other judges. R. M. 17 Car. 2. Pay each clerk 2s.; they are to be delivered two days before argument.

N. B. Counsel must have a copy of the paper-book to move for judgment, or argue the errors. The entry on the roll to be made of the term the transcript is of.

If plaintiff's
attorney neglects
to deliver books.

If plaintiff's attorney neglects to deliver the books on his part, defendant in error may deliver all; then judgment will be given of course against the plaintiff; defendant draws up the rule at the clerk of the rules for judgment; pay 4s.; stamp it with a double half-crown stamp, and the master will tax the costs thereon without a bill, but you must have the roll for him to mark, bespeak it of the clerk of the treasury to bring it to the master.

Of

Of Interest.

It is now settled that the party is to pay interest on the judgment. 2 Term Rep. 78.

In *Zinckes v. Langton* a rule was made absolute, Rule absolute to in affirmance in the K. B. for the master to compute compute interest, interest on the sum found from the day of signing final judgment below, and to be added to the costs &c. taxed on the affirmance. Dougl 752. in notes.

It may happen that the plaintiff in error will not assign the want of an original, &c. or pray a *certiorari*, therefore in that case the general assignment, If general errors assigned. "that the judgment is given for plaintiff, whereas "it ought to have been given for defendant," is made; in that case you may deliver the joinder on a treble penny stamp forthwith, and move for a *consilium*, as before, without a rule to return the *certiorari*.

The defendant in error voluntarily takes notice Joinders of the assignment of errors, by delivering his joinder in *nullo est erratum*; if so, there is no occasion for a *scire facias ad audiendum errores*. Carth. 40.

If the *scire facias* is entered on the same roll with the writ of error, then he may assign his error without suing forth a *sci. fa. ad audiend. errores*, for defendant in error to come in and hear the errors assigned; otherwise he must sue out a *sci. fa. ad audiend. errores*, to give defendant in error notice. If Rule to join in assignment of errors is delivered, a rule to join in error may be given by the master, to force defendant in error to proceed.

George, &c. To the Sheriff of *Middlesex*, greet- Scire facias quare ing: Whereas *A. B.* lately in our court, before *Alexander* lord *Loughborough* and his companions, our justices of the bench at *Westminster*, by our writ, and by the judgment of the same court, recovered against *C. D. late of Westminster, in your county, yeoman*, 47l. 10s. for his damages, which he sustained by occasion of the not performing certain promises and undertakings lately made by the said *C.* to the said *A.* at *Westminster* in your county, as for

The return of this is to be guided by the original proceedings. *Str.* 694.

^a In the *alias* say "as before we have commanded you."

Præcipe.

After error allowed, defendant in error became bankrupt, assignees to proceed in bankrupt's name.

for his costs and charges by him about his suit in that behalf laid out, whereof the said *C.* is convicted, as by the record and proceedings thereof, which we lately caused to be brought into our court before us, for certain causes of error, manifestly appears; and now on the behalf of the said *A.* we have been informed in our said court before us, that although judgment be thereon given, yet execution of the damages aforesaid still remains to be made to him the said *A.* whereupon the said *A.* hath humbly besought us, that we should provide him a proper remedy in this behalf; and we being willing that what is just and right should be done in this particular, command you^a, that by honest and lawful men of your bailiwick, you make known to the said *C. D.* that he be before us on _____ day of _____ in the _____ year of our reign. *Stormont and Way.*

Middlesex, sci. fa. quare, &c. between *A. B.* plaintiff in error, and *C. D.* defendant, returnable on _____ wheresoever, &c. *J. B.* attorney.

To be signed by Messrs. *Provest* and *Webb*, pay 1s. 8d. seal 7d.

After judgment, a writ of error was brought, allowed, and served; afterwards defendant in error became a bankrupt, and his assignees sued a *scire facias quare executionem non*; motion to quash the writ. *Buller J.*—The rule is, that the assignees cannot make themselves parties to the record in any intermediate stage of the proceedings, but must be immediately after judgment; though an interlocutory

locutory judgment is sufficient for that purpose. Here the assignees should have gone on with the writ of error in the bankrupt's name till judgment. *Rule absolute. Kretzman v. Beyer. 1 Term Rep. 463.*

— term, in the 31st year of the reign of king George the third.

Stormont and Way.

C. D. } Afterwards, that is to say, on
agt. } next after

Assignment of
errors, that there
is no original
writ filed of
record.

A. B. } this same term, before our lord the king at
Westminster, comes the said C. D. by J. B. his attorney, and says, that in the record and proceedings aforesaid, and also in the giving of the judgment aforesaid, there is manifest error in this, to wit, that the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said A. B. to have or maintain his aforesaid action thereof against the said C. D. ; there is also error in this, to wit, that by the record aforesaid it appears, that the said C. D. was attached to answer to the said A. B. in the plea aforesaid, yet no original writ between the parties aforesaid, in the plea aforesaid, is filed of record, nor remains of record in the said court of the said lord the king of the bench at *Westminster* aforesaid; therefore in that there is manifest error: There is also error in this, that it appears by the record aforesaid, that the judgment aforesaid, in form aforesaid given, was given for the said A. against the said C. whereas by the law of the land, the said judgment ought to have been given for the said C. against the said A. ; and the said C. prays a writ of the said lord the king to be directed to the *custos brevium* of the said court of the bench at *Westminster*, to certify to the said lord the king the truth of the same, and it is granted to him, &c. And the said C. prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing ;

Y y

and

and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

A. Chambre.

The want of warrants of attorney assigned.

If you assign the want of warrants of attorney for error, go to the end of the general errors and say, "there is also error in this, to wit, that there is no warrant of attorney filed of record, nor remains of record in the court of the lord the king of the bench at *Westminster*, between the parties aforesaid in the plea aforesaid, to warrant the said *J. K.* to be attorney for the said *A. B.* against the said *C. D.* in the plea aforesaid; therefore in this there is manifest error; and the said *C.* prays a writ of the lord the king to be directed to the chief justice of the said court of the bench, to certify to the said lord the king the truth of the same, &c. and it is granted to him, &c. and the said *C.* prays, &c." as above.

Certiorari to certify warrants of attorney.

George the third, &c. To our right trusty and well beloved *Alexander* lord *Loughborough*, our chief justice of the bench, greeting: We being willing for certain causes to be certified, whether *A. B.* made *J. D.* gentleman his attorney on record, against *C. D.* late of *W.* in the county of *Middlesex*, yeoman, in a plea of trespass on the case; before you and your companions, our justices of the bench aforesaid, do command you, that you search the records, and other remembrance rolls, of warrants of attorney, for the county of *Middlesex*, being in your custody, filed of record of term, in the year of our reign; and what you shall find therein, concerning the said warrants of attorney between the parties aforesaid, of the plea aforesaid, you certify to us without delay, wheresoever we shall then be in *England*, as fully as the same remains in your custody, together with this writ. Witness *Lloyd* lord *Kenyon*, &c.

To be ingrossed on 10s. stamped parchment, signed by Messrs.

Pronoff and *Webb*, 1s. 8d. seal 7d.

Stormont and *Way.*

Præcipe.

Middlesex. *Certiorari* to certify a record of warrants of attorney between *A. B.* plaintiff, and *C. D.* late of, &c. defendant: returnable without delay.

It

It is ordered, that no writ of *certiorari* upon any writ of error shall be sued out or made by any clerk or attorney of the court, after a writ of *certiorari* in the same cause hath been already sued out and returned, without motion in court by counsel. *R. E.*

II Car. 1.

George the third, &c. To our right trusty and well beloved holding the office of *Certiorari* to certify the original.

keeper of the writs, rolls, and records of our court of the bench, greeting: We being willing for certain causes to be certified, whether any original writ between *A. B.* and *C. D.* late of Westminster, in the county of Middlesex, yeoman, in a plea of trespass on the case, to be filed in your custody or not, do command you, that you search our original writs, directed to our sheriff of Middlesex, and which are filed of record in your custody of term (the term the original is returnable), in the 30th year of our reign, and what you shall find therein of an original writ issued between the parties aforesaid, of the plea aforesaid, you certify to us without delay, wheresoever we shall then be in England, together with the return and indorsement thereon, as fully as the same remains in your custody; and have there this writ. Witness *Lloyd* lord *Kenyon*, at Westminster, the day of in the 31st year of our reign. *Stormont and Way.*

Middlesex. *Certiorari* to certify the record of an original between *A. B.* plaintiff, and *C. D.* defendant: returnable without delay.

C. D. } Trinity term, in the 31st year of king
agt. } George the third.

A. B. } *Stormont and Way.*

Afterwards, to wit, on next after Assignment of in this same term, before our lord the general errors. king at Westminster, comes the said *C.* by *A. K.* his attorney, and says, that in the record and process aforesaid, there is manifest error in this, to wit, that the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said *A.* to have or maintain his aforesaid action thereof against him

him the said *C*; there is also error in this, to wit, that by the record and process aforesaid, it appears, that the judgment aforesaid, in form aforesaid given, was given for the said *A.* against the said *C.* whereas by the law of the land, the said judgment ought to have been given for the said *C.* against the said *A.*; and the said *C.* prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

J. M.

Errors in fact
and law may be
assigned.

The plaintiff may assign for error, an error in fact or errors in law, *F. N. B.* 20. *e.* On error in fact assigned, plaintiff may conclude with an averment, for defendant may put in issue if he pleases, *1 Burr.* 410. But he cannot assign both; for this will be double. *1 Sid.* 147. *1 Lev.* 105. 76. If error in fact and in law be assigned, as that the defendant was an infant at the time of the promises being made, and also appeared by attorney, the defendant may demur specially, and judgment will be affirmed. *Burdett v. Wheatley*, 2 *Ld. Ray.* 883.

If both, may de-
mur.

How to proceed
if error in fact
assigned.

Upon issue taken of error in fact, you may proceed to trial as in other common cases, and if found for the plaintiff on trial, he must move to put the cause in the paper for argument, and then, on producing the *posse* the court will give judgment of reversal. In this case the defendant may carry the cause to trial without *proviso*.

Joinder in nullo
est erratum.

And hereupon afterwards, to wit, on next after in the year of the reign of our said lord the king, the said *A.* by his said attorney, feely comes here into court, and says, that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid; and he prays that the said court of our said lord the king now here, may proceed to examine, as well the record and proceedings aforesaid, as the matters aforesaid above for error assigned: and that the judgment aforesaid, in form aforesaid given, may

Need not be
signed by coun-
sel.

may be in all things affirmed: But because the court of the said lord the king now here, is not yet advised what judgment to give of and concerning the premises, a day is therefore given to the parties aforesaid to come before the said lord the king on wheresoever, &c. to hear the judgment aforesaid, for that the court of the said lord the king now here, is not yet advised thereof, &c.

Which said writ of *certiorari* so prayed and granted, follows in these words, to wit: *George* (here set forth the writ of *certiorari*, *verbatim*. *Stor-*
mont and Way); then say. Which said chief justice of the bench aforesaid, returned and certified unto the said lord the king, that by virtue of the said writ, he had searched the records, and other remembrance rolls of the warrants of attorney for the said county of *Middlesex* in his custody, filed of record of

Joinder in error, where the want of an original is assigned.

term, in the year of the reign of the said lord the king, and that there is an original writ issued against the said *C. D.* at the suit of the said *A. B.* in the plea aforesaid, in his custody filed of record, which said writ he the said chief justice thereby certified to the said lord the king, as appeared by the schedule thereunto annexed, which said schedule so annexed to the said writ of *certiorari*, follows in these words, to wit (here set forth the schedule *verbatim*); which said writ of *certiorari*, together with the return thereof, among the records of term aforesaid is filed; and hereupon afterwards, to wit, on next after

No counsel's hand requisite,

in the year of the reign of the said lord the king, the said *A.* by his attorney aforesaid, freely comes here into court, and says, that there is no error, either in the record and proceedings aforesaid, or in giving the judgment aforesaid; and he prays that the court of the said lord the king, now here, may proceed to examine, as well the record and proceedings aforesaid, as the matters aforesaid for error assigned, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed; but because the court of the said

Continuance.

^a The day of
concilium.

Joinder where
the want of a
warrant is
assigned.

lord the king, now here, is not yet advised what judgment to give of and upon the premises aforesaid, a day is given therefore to the parties aforesaid, to come before the said lord the king on ^a to hear the judgment aforesaid, for that the said court of the said lord the king, now here, is not yet advised thereof, &c.

As before, to the end of the *certiorari*. *Stormont* and *Way*; which said chief justice of the bench aforesaid returned, and certified unto our said lord the king, that by virtue of the said writ of *certiorari*, he had searched the records and other remembrance rolls of the warrants of attorney for the county of *Middlesex*, in his custody, filed of record of term, in the year of the reign of the said lord the king, and that there was a warrant of attorney to warrant the said *J. D.* to be attorney for the said *A. B.* against the said *C. D.* in the plea aforesaid, in his custody, filed of record of the term aforesaid; the tenor of which said warrant of attorney, as fully as the same remained in his custody filed of record, he the said chief justice thereby certified to the said lord the king, as appeared by the schedule thereunto annexed, as the said chief justice was in the said writ of *certiorari* commanded: which said schedule so annexed to the said writ of *certiorari*, follows in these words, to wit (*the rolls of attornies, &c.*), here copy the schedule; then say, which said writ of *certiorari*, together with the return thereof, among the records, without day of term aforesaid is filed. And hereupon (as in the former).

Entry of affirm-
ance of the judg-
ment in *K. B.*

At which day, before the lord the king at *Westminster*, came the parties aforesaid by their attornies aforesaid: Whereupon, as well the record and proceedings aforesaid, and the judgment given in form aforesaid, as the matters aforesaid by the said *C.* above for error assigned, being seen and fully understood by the court of the said lord the king now here, and mature deliberation had thereupon; it appears to the court of the said lord the king now here, that there is no error either in the record and proceedings

proceedings aforesaid, or in the giving of the judgment aforesaid : Therefore it is considered by the said court of the said lord the king, before the king himself, that the judgment aforesaid, given in form aforesaid, be in all things affirmed, and do stand in its full strength and effect (the said causes above for error alledged in any wise notwithstanding). And it is further considered, that the said *A.* recover against the said *C.* 14*l.* adjudged to him at his request, by the court of the lord the king now here, according to the form of the statute in such case made and provided, for his damages, costs, and charges, which he hath sustained by reason of the delay of the execution of the judgment aforesaid, and by the prosecution of the said writ of error, and that he may have execution thereof, &c.

Judgment signed
day of
17

Though a transcript of the record is only removed into the *K. B.* on a writ of error from the *C. P.* the *King's Bench* award the execution. *Vicars v. Haydon.* *Cowp. Rep.* 843.

K. B. award, execution on affirmation.

At which day, before the said lord the king at *Westminster*, come the parties aforesaid, by their attorneys aforesaid, whereupon as well the record and proceedings aforesaid, and the judgment aforesaid, in form aforesaid given, as the matter aforesaid, by the said *C.* for error assigned, being seen and fully understood by the court of the said lord the king now here, and mature deliberation had thereupon ; for that it appears to the court of the said lord the king now here, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, *there is manifest error* : Therefore it is considered that the judgment aforesaid, for the error aforesaid, and other errors in the record and proceedings aforesaid, be reversed, annulled, and altogether held for nothing ; and that the said *C.* be restored to all things which he hath lost by occasion of the judgment aforesaid, &c.

Judgment of reversal.

Afterwards, to wit, on next after in this same term, before the lord the king at *Westminster*, comes the said *A. B.* by his attorney aforesaid, and says, that execution of the judgment aforesaid

The entry of a nonpross alter scire facias quare executionem non in error for want of assigning errors in *K. B.*

still remains to be made unto him : Therefore he prays the writ of the lord the king to be directed to the sheriff of the county of *Middlesex* aforesaid, that he cause to be made known to the said *C. D.* to be before the said lord the king wheresoever, &c. to shew if any thing he has or knows to say for himself, why the said *A. B.* ought not to have execution of his damages, costs, and charges aforesaid, according to the form and effect of the judgment aforesaid ; and it is granted to him, &c. Therefore the sheriff is commanded, that by good and lawful men of his bailiwick, he make known to the said *C. D.* that he be before the lord the king (the return of the *scire facias quare*, &c.) wheresoever, &c. to shew in form aforesaid, if, &c. and further, &c. the same day is given to the said *A. B.* &c. at which day the said *A. B.* by his attorney aforesaid, comes before the lord the king at *Westminster*, and offers himself against the said *C. D.* in the plea aforesaid, and the sheriff (to wit) *J. W.* esq. and *E. F.* esq. sheriff of the said county of *Middlesex*, returns that by virtue of the said writ to him directed, by *J. W.* and *W. P.* good &c. he has given notice to the said *C. D.* to appear, &c. to shew as by that writ he was required ; and the said *C. D.* being solemnly called, doth not come, but makes default ; and hereupon the said *A. B.* says, that the said *C. D.* hath assigned no error or errors in the record and proceedings aforesaid, or in giving the judgment aforesaid ; therefore a day is given to the parties aforesaid, to come before the lord the king, on

Scire faci.

Plaintiff in error
makes default.

Judgment signed
day of

17

, that is to say, for the said *C. D.* to assign error or errors in the record and proceedings aforesaid, or in giving the judgment aforesaid. At which day, before the said lord the king at *Westminster*, comes the said *A. B.* by his attorney aforesaid ; and the said *C. D.* being solemnly called doth not come, but again makes default, nor has he farther prosecuted the said writ of error against the said *A. B.* Therefore it is considered, that the said *A. B.* recover against the said *C. D.* as well his damage

mages aforesaid, as also 17*l.* adjudged to him by the court of the said lord the king now here, according to the form of the statute in such case made and provided, for his damages, costs, and charges, which he has sustained by occasion of the delay of execution of the judgment aforesaid, by means of the prosecution of the said writ of error, and that the said *A. B.* have execution thereof, &c.

In the exchequer chamber, these entries are all made by Mr. *Poole*.

The writ of execution on these judgments must be issued *in the county where the original venue was laid*, and if in any other county a *testatum* is to issue, and to ground it, the first writ must issue, and may afterwards be returned.

To be issued in the county where venue laid.

George the third, &c.
to the sheriff of *Middlesex*, greeting: We command you, that of the goods and chattels in your bailiwick of *C. D.* you cause to be made 5*l.* which *A. B.* lately in our court before us at *Westminster*, by bill without our writ, and by the judgment of the same court, recovered against the said *C. D.* for his damages, which he had sustained, as well by reason of the not performing

A ca. sa. for ditto.
George the third, &c.
to the sheriff of *Middlesex*, greeting: We command you, that you take *C. D.* if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us at *Westminster*, on next after to satisfy *A. B.* 10*l.* for his damages which he hath sustained, as well by reason of the not performing

certain promises and undertakings made by the said *C.* to the said *A.* as for his costs and charges by him about his suit in that behalf expended, whereof the said *C.* is convicted, as appears to us of record; and also 1*l.* which to the said *A.* in our court of *Exchequer chamber* at *Westminster* before our justices of the bench, and the barons of our *Exchequer* of the degree

degree of the coif there, according to the form of the statute lately made and provided, were adjudged for his damages, costs, and charges, which he had by reason of the delay of the execution of the judgment, aforesaid, by the pretence of the prosecution of our writ of error brought in the premises by the said *C.* against the said *A.* the said judgment being there in all things affirmed, of which the said *C.* is also convicted; as by the record and proceedings of our said justices and barons by them had in the premises, and by them remitted into, and now remaining in our said court before us at *Westminster*, also appears to us of record:

And have you the said monies before us at *Westminster*, on next after to render to the said *A.* for his damages aforesaid; and have there then this writ. Witness, &c. *Stormont and Way.*

If on a *nonpros* for not assigning errors in the Exchequer chamber.

If it is on a *nonpros* for not assigning errors, then go to the end of the first recovery, and say, "And also 11*l.* adjudged to the said *A.* in our said court of *Exchequer* chamber, by our justices of our court of Common Bench, and our barons of our *Exchequer* of the degree of the coif, according to the form of the statute in such case made and provided, for his damages, costs, and charges, which he hath sustained by reason of the delay of the execution of the judgment aforesaid, on pretext of prosecuting our writ for correcting of error, brought in the premises, because the said *C.* did not prosecute the said writ with effect, of which the said *C.* is also convicted, as by the record and proceedings of our said justices and barons by them had in the premises, and by them remitted to and remaining in our said court before us at *Westminster*, also appears to us of record. And have you there then this writ. Witness, &c.

If it is from the *Common Pleas* in the *King's Bench*, for not assigning errors, then as follows;

Fi.

Fi. fa. in case.

George the third, &c. to the sheriff of *Middlesex*, greeting: We command you that you cause to be levied of the goods and chattels of *C. D. late of*, &c. *yeoman*, in your bailiwick, 200*l.* which *A. B.* lately in our court, before *Alexander* lord *Loughborough* and his brethren, then justices of our court of Common Bench, recovered against the said *C.* for his damages which he had by means of the not performing certain promises and undertakings lately made by the said *C.* to the said *A.* at *Westminster* in your county, whereof the said *C.* is convicted,

Ca. sa. in case.

George, &c. to the sheriff of *Middlesex*, greeting: We command you, that you take *C. D. late of*, &c. *yeoman*, if he be found in your bailiwick, and safely keep him, so that you have his body before us at *Westminster*, on wherefover we shall then be in *England*, to satisfy *A. B.* 600*l.* for his damages, which the said *A. B.* lately in our court, before *Alexander* lord *Loughborough* and his brethren, then his Majesty's justices of the bench at *Westminster*, recovered against the said *C.* for his damages which he sustained by reason of the not performing certain promises and undertakings, made by the said *C.* to the said *A.* at *Westminster* in your county, whereof the said *C.* is convicted,

For not assigning errors from *C. P.* to *K. B.*

as by the inspection of the record and proceedings thereof, which we lately caused to come into our court before us at *Westminster*, for certain causes of error, and now there remaining, it appears to us of record: And also 11*l.* which were awarded to the said *A.* in our court before us at *Westminster*, according to the form of the statute in such case made and provided, for his damages, costs, and charges, which he had sustained by occasion of the delay of execution of the said judgment, on pretext of

of

of prosecuting the said writ for correcting errors brought by the said *C.* against the said *A.* of and upon the premises aforesaid, because the said *C.* did not prosecute the said writ with effect, whereof the said *C.* is convicted, as appears to us of record.

And have you the said money before us on wheresoever we shall then be in *England*, to render to the said *A.* for his damages, costs, and charges aforesaid, and this writ. Witness, *Lloyd lord Kenyon, &c.*

And have you there this writ. Witness, *&c.*
Stormont and Way.

To be sealed only.

Witness, *Lloyd lord Kenyon, &c.*

Stormont and Way.

Fi. fa. in debt upon affirmation in the *King's Bench*, from *C. P.*

George the third, *&c.* to the sheriff of *Middlesex*, greeting: We command you, that you cause to be made and levied of the goods and chattels in your bailiwick of *C. D. late of Westminster in your county, yeoman*, as well a certain debt of 40*l.* which *A. B.* lately in our court, before *Alexander lord Loughborough* and his brethren, our justices of the bench at *Westminster*, recovered against the said *C.* as also 10*l.* for his damages which he sustained, by reason of the detaining the said debt,

Ca. fa. in debt upon affirmation in the *King's Bench*, from *C. P.*

George, &c. to the sheriff of *Middlesex*, greeting: We command you, that you take *C. D. late of Westminster*, in your county, *yeoman*, if he be found in your bailiwick, and him safely keep, so that you have his body before us on the morrow of *All Souls*, wheresoever we shall then be in *England*, to satisfy *A. B.* as well a certain debt of 28*l.* which the said *A. B.* lately in our court, before *Alexander lord Loughborough* and his brethren, our justices of the bench, at *Westminster*, recovered against the said *C.* as also

also 16*l*. which, in our said court of the bench, were adjudged to the said *A. B.* for his damages which he sustained by occasion of the detaining the said debt,

whereof the said *C.* was convicted, as by the record and proceedings thereof which we lately caused to come into our court before us, for certain causes of error, now there remaining, appears to us of record: And also 14*l*. which were adjudged to the said *A.* in our said court before us at *Westminster*, according to the form of the statute in such case made and provided, for his damages, costs, and charges, which he had by occasion of the delay of the execution of the judgment aforesaid, by the presence of the prosecution of our writ of error brought by the said *C.* against the said *A.* of and upon the premises aforesaid, upon which said writ of error, the judgment aforesaid, against the said *C.* being in our said court before us, in all things affirmed, whereof the said *C.* is also convicted, as appears to us likewise of record:

And have you the said monies before us on this writ. Witness, &c. wheresoever we shall then be in *England*, to render to the said *A.* for his debt and damages, costs and charges aforesaid, and also this writ. Witness, &c. *Stormont and Way.*

If you want a *testatum*, see title *Execution*.

George, &c. to the sheriff of *M.* greeting: Writ of restitution on reversal by the *K. B.* of a judgment given in the *C. P.* and *f. fa.* and *ca. fa.* for money paid.
Whereas *A. S.* lately, that is to say, in *Trinity* term, in the 30th year of our reign, in our court, before *Alexander* lord *Loughborough* and his companions, then our justices, at *Westminster*, by our writ, and by the consideration of our said court, recovered against *J. O.* late of, &c. 100*l*. which in our said court of the bench were awarded to the said *A.* as for her costs and charges which she had been

been put unto about her suit in that behalf, whereof he is convicted, as by the record and proceedings thereof which we lately caused to be brought into our court before us, for certain causes of error, appears to us of record. And whereas we, by reason of divers errors in the said record and proceedings, and also in giving the said judgment, have reversed and totally annulled the same: It is therefore considered and adjudged in our said court before us, that the said *J.* be restored to all things he hath lost by occasion of the said judgment: And for that the said *A.* sued out execution upon the said judgment, and he the said *J.* was thereupon taken in execution for the same, and detained in prison until payment was made to the said *A.* of the said 100*l.* Therefore we command you

Fi. fa.

Qu. if this must not be moved for, or a *sci. fa.* issued before it can be sued out.

Return to be as the original proceedings are.

that of the goods and chattels of the said *A.* in your bailiwick you cause to be made and levied the said 100*l.* and have you that money before us, on wheresoever, &c. to restore to the said *J.* the said 100*l.* so awarded to him, by our said court, before us, upon the reversal of the said judgment, and have there this writ. Witnesses, &c.

Where the money appears upon the record to be levied and paid to the party, the defendant shall have restitution without a *sci. fa.* *Salk.* 588.

If judgment is reversed, the party shall be restored to all that he has lost, and a writ of restitution shall be awarded. 2 *Cro.* 698. *Vide* 4 *Mod.* 161. as to the value sold for.

If the money is levied and not paid, a writ of restitution shall not go against the sheriff without a *sci. fa.* *Salk.* 588.

Ca. fa.

that you take the said *A.* if she shall be found in your bailiwick, so that you may have her body before us, on wheresoever, &c. to satisfy to the said *J.* O. for the said 100*l.*

Error quod corum vobis resident'.

If a judgment is given in this court, and it be erroneous in matter of fact, and not in law, this writ may be brought returnable here to reverse it: For error in fact is not the error of the judges, and therefore the reversing of a judgment given by them which is only erroneous in matter of fact, is not reversing their own judgment; but it is otherwise in matter of law, for they cannot be thought to reverse their own judgments.

If, for instance, an infant appear by attorney, and judgment be given against him, he may have this writ to reverse it: In this case, a *præcipe* is to be made for the curfitor of the county where the *venue* is laid, and when the same is sealed, it must be allowed by the master in open court, and then the clerk of the rules will draw up a rule for that purpose, which being served on the attorney for the original plaintiff, is a *superfedeas* to the execution, on the plaintiff in error putting in and justifying his bail within four days next after such allowance.

It is ordered, that the writ of error issued between the parties in this cause be allowed: And upon the plaintiff in error putting in and justifying his bail within four days next ensuing, that further proceedings be stayed on the judgment in the original action, until the said writ of error now depending between the parties be determined.

By the Court.

There needs no *superfedeas* to this writ, as the rule stays the execution, although it is laid down in all the books the contrary.

It is said also, that this writ may be allowed in vacation by the master, but I think not.

An infant ought to have a guardian appointed by the court to prosecute the writ, as in other cases, before assignment of errors; *vide Coke's Entries*, title Error; and he should assign them by guardian.

When the writ is returnable, apply to the master for a rule to assign, which he will give in this form: *A. B. v. C. D. "Unless the plaintiff in error assigns*

" errors

Lies for error in fact.

If an infant appear by attorney, he may have this writ to reverse the judgment.

Rule for allowance.

Rule to assign.

"errors within four days next after notice given to him or his attorney, a nonpros may be signed;" which take to the clerk of the rules to enter, pay 1s. 10d. he will write the word *entered* upon it; serve copy on the attorney. The errors to be assigned must be facts only; proceed to trial as in common cases, and the defendant in error may carry the cause down to trial without *proviso*.

N. B. There needs no *scire facias* in this case to compel plaintiff in error to assign errors. If the issue is found for the plaintiff in error, he must move to put the cause in the paper for argument, and then upon producing the *possea*, the court will give judgment of reversal.

When error abates, this writ may be sued.

If error abates, or is discontinued, after the record itself is removed, there shall be a new writ *que coram vobis residet*. *Yelv. 6. 1 Rol. 753. l. 40.*

If error be quashed.

If error be quashed for any fault but variance, error *coram vobis* lies. *Str. 606. Cooper v. Ginger. Ld. Ray. 1403.*

Error *coram vobis* lies not after affirmance in the Exchequer Chamber. *Str. 975. Burleigh v. Harris, 690. Contra 940.*

It must be entered upon the same roll with the first, that the court may see altogether. *Cro. Eliz. 155. 281.*

Error in Parliament.

How a writ of error in parliament is made returnable.

A Writ of error, that is brought in parliament, is made returnable immediately, or upon a prorogation *ad proximum parliamentum*, because that court, during the session of it, sits continually, and has no vacation, and it is for the honor of that high court to be immediately attended, that they may do the speedier justice. The proceedings there are very expeditious, there being no *scire facias quare executionem non*; but when the transcript is brought in, on a motion in the house by a peer, a day is appointed

appointed for the plaintiff in error to assign his errors, and after issue is joined on *in nullo est erratum*, upon another motion their lordships appoint a day for hearing the errors; at which day both parties must attend with their counsel, but neither party must have more than two. *Sty. Pract. Reg.* 235.

The writ is made out by the curfitor of the county where the *venue* is laid; pay him 6*l.* 3*s.* 6*d.* if no private seal, and the curfitor procures the warrant from the king; make a *præcipe* for it, take it to Mr. Parry's office, and he will allow it, pay 4*l.* a copy of which serve on the attorney for plaintiff in the original action. How to sue it out.

If bail is required, it is to be put in before a judge of the *King's Bench*, apply to Mr. Parry for that purpose, and give notice thereof; if the defendant in error is dissatisfied, he may have a rule for better bail at Mr. Parry's; serve copy, the opposite attorney then gives notice of justification, apply to Mr. Parry to bring down the book, give affidavit of service of notice to counsel to move to justify, draw up the rule for the allowance at Mr. Abbot's, and serve copy. As soon as parliament sits, get a rule to transcribe at Mr. Parry's office, serve copy on the opposite attorney, it expires in 8 days after service; the defendant's attorney leaves the pleadings with the clerk of the errors to make up the transcript, who will send to plaintiff in error for the money; when the transcript is examined Mr. Parry delivers it to the chief justice of the *King's Bench*, who carries the record and transcript to the lords in parliament, (his fee is 4*l.*), with whom, after they are examined, he leaves the latter, but the record is brought back again; Mr. Parry attends the chief justice to the house. If bail be required, how to proceed.

Serving the bail below with a writ on the recognizance, pending the writ of error, is a contempt and breach of privilege. *Peer W.* 685.

Court of K. B. will oblige defendant to enter in- waste. to a rule not to commit waste or destruction pending the writ of error. *Wharod v. Smart*, 3 *Burr.* 1823.

You are obliged to employ one of the clerks in parliament, to proceed in error after the transcript is delivered over; he conducts the whole proceedings, except preparing the cases and briefs for counsel.

No *sci. fa.* issues to compel an assignment of errors.

No *scire facias* issues for the assignment of errors; but on a motion made by a peer, a day is appointed for the plaintiff to assign errors; he is allowed *eight days* next after service. If errors are not filed in the parliament office, the clerk of the parliament will get it *nonprossed*, and make out a *remittitur* of the transcript, which is filed in the *King's Bench* by the attorney.

If plaintiff alleges diminution, a *certiorari* is to be issued in ten days.

If the plaintiff in error alleges diminution, and prays a *certiorari*, the same is to be issued without any motion, and to be returned in ten days; which, if not done, or good cause shewn to the house to the contrary, the plaintiff will lose the benefit of his writ. 1 *Salk.* 267.

Argument.

To obtain a hearing, the plaintiff in error must get a peer to move the house, that on assigning errors, the defendant may appear and make his defence.

How to get a short day appointed.

If the house be likely to get up soon, after assignment of errors, on pleading *in nullo est erratum*, the clerk in parliament will get a peer to move the house to appoint a short day for the hearing of the cause.

Cases must be drawn up, and signed by counsel, and printed.

The cases must be drawn up and signed by counsel on each side, which are afterwards printed, and 250 on each side are delivered at the parliament-office, some of which are given to the lords, as also the judges; 500 on each side are generally printed. The lords examine the errors with the assistance of the judges, in all affairs of weight and nicety. On the hearing, the lords either affirm or reverse the judgment; on which the clerk of the parliament draws a *remittitur* of the transcript of the record into the *K. B.* which is signed by counsel, and entered with the affirmance or reversal; and the court below awards execution, &c.

If

If on a judgment in the Common Pleas, a writ of error be brought in the King's Bench, and bail put in thereon, and judgment affirmed, and afterwards a writ of error be brought in parliament, the party must give a new recognizance, for the first does not include costs to be assessed in the house of lords. *Salk. 97. Str. 527. Colebrooke v. Diggs.*

New bail to be given in parliament.

The house of lords give sometimes very large, sometimes very small costs in their discretion, according to the nature of the case, and the reasonableness or unreasonableness of litigating the judgment of the court below, and the practice is to give interest from the day of signing the judgment to the day of affirming it there, computed according to the *current, not* according to strict legal, rate of interest. *2 Burr. 1097. Bodily v. Bellamy.*

Costs.

In a writ of error from the *K. B.* to the house of lords, only a transcript of the record is sent up; and when remitted, the *King's Bench* award execution. *Vicars v. Haydon, Cowp. Rep. 843.*

Only a transcript is sent to house of lords.

Standing Orders of the House.

By several orders of parliament for the more speedy prosecuting of writs of error, it is directed that the plaintiffs in all writs of error after the records be brought in, shall speedily repair to the clerk of the parliament, and prosecute the writs of error, and satisfy the officers of this house their fees justly due, and shall assign errors within eight days after the bringing in such writs with the records; and if the plaintiffs make default, then the said clerk, if the defendant in such writ requires it, shall record a *nonpros*, and that the record be remitted: and if any plaintiff alledge diminution, and prays a *certiorari*, the clerk shall enter an award thereof accordingly; and the plaintiff may, before *in nullo est erratum* pleaded, sue forth the writ of *certiorari* in ordinary course, without special petition or motion to this house for the same; and if he shall not prosecute such writ, and procure it to be returned with-

Orders on writs of error in parliament.

Errors to be assigned in eight days, or *nonpros* and *remittitur*.

If diminution alledged and *certiorari* prayed.

Certiorari to go without motion, and be returned in ten days,

or lose benefit thereof, and defendant to proceed as if none awarded.

No cases to be delivered unless signed by counsel.

No putting off a day of hearing, without notice of two days, and oath thereof.

Certificates to be given of *certiorari*'s being awarded concerning writs of error.

How counsel are to proceed.

Error doth not determine by prorogation.

Assignment of errors.

in ten days next after his plea of diminution put into this house, then unless he shall shew good cause to enlarge the return of such writ, he shall lose the benefit of the same; and the defendant may proceed as if no such *certiorari* were awarded. *Ordo dom. procer. die Veneris, 13 Decemb. 1661.*

That no person presume to deliver any printed cases to any lord, unless signed by one or more of the counsel who attend the hearing of the cause in the courts below, or shall be of counsel at the hearing in this house, *Ordo dom. procer. die Martis, 19 April 1698.*

It is ordered, That when a day shall be appointed for the hearing of any cause, appeal, or writ of error, the same shall not be altered but upon petition; and that no petition shall in such case be received, unless *two days notice* be given to the adverse party, of which notice oath shall be made at the bar of this house. *Ordo dom. procer. die Mercur. 22 Decemb. 1703.*

That when diminution shall be alledged, and a *certiorari* prayed and awarded before *in nullo est erratum* pleaded, the clerk shall, upon request, give a certificate thereof. *Ordo dom. procer. die Veneris, 21 Feb. 1717.*

That at the hearing of causes, one of the counsel for the appellants shall open the cause, then the evidence on their side shall be read, which done, the other counsel for the appellants may make observations on the evidence: then one of the counsel for the respondents shall be heard, and the evidence on their side read, after which the other counsel for the respondents shall be heard, and one counsel only for the appellants to reply. *Ordo dom. procer. die Sabbat. 2 Mart. 1727.*

That a writ of error doth not determine by prorogation of parliament, but continue and to be proceeded upon *in statu quo*, as at the dissolution of the last parliament. *Ray. 383. So declared 2 Lev. 93.*

Afterwards, that is to say, on the day of in the 31st year of the reign of our sovereign lord George the third, king of Great Britain, &c. before

fore the king himself in parliament, the said *A.* by *J. K.* his attorney, comes and says, that in the record and process aforesaid, and also in giving the judgment aforesaid, there is manifest error, in this, to wit, as in other assignments exactly. To be engrossed on treble penny parchment, and delivered to your clerk in parliament, signed by counsel.

George the third, &c. To the sheriff of *Middlesex*, greeting: Whereas we lately commanded our sheriffs of *London*, that they should cause to be made and levied of the goods and chattels of *C. D.* late of

A test. fi. fa. in case on a judgment affirmed in parliament.

Esq; the sum of *l.* which *A. B. Esq;* lately in our court before us at *Westminster*, by our writ, and by the judgment of the same court recovered against the said *C. D.* for his damages which he had sustained, as well by reason of the not performing certain promises and undertakings made by the said *C. D.* to the said *A. B.* as for his costs and charges by him about his suit in that behalf expended, whereof the said *C. D.* was convicted, as appeared to us of record in our said court before us, and also *l.* which to the said *A. B.* in our court of parliament, according to the form of the statute lately made and provided, were adjudged for his damages, costs, and charges, which he had by reason of the delay of the execution of the judgment aforesaid, by means of the prosecution of our said writ of error, the said judgment being in our said court of parliament in all things affirmed: whereof the said *C. D.* is convicted, as by the inspection of the record and proceedings thereof from our said court of parliament into our court before us remitted, appears likewise to us on record, and that our said sheriffs of *London* should have the aforesaid monies before us at *Westminster* at a certain day now past, to render to the said *A. B.* for his damages, costs, and charges aforesaid: And our said sheriffs of *London* at that day returned to us, that the said *C. D.* had not any goods or chattels in their bailiwick, whereof they could cause to be levied the said damages, or any part thereof; whereas it is sufficiently testified in our said court

before us, on the behalf of the said *A. B.* that the said *C. D.* hath sufficient goods and chattels in your bailiwick, whereof you can cause to be levied the damages, costs, and charges aforesaid; therefore we command you, that of the goods and chattels of the said *C. D.* in your bailiwick, you cause to be levied the aforesaid sums of *l.* and *l.* and that you have the said monies before us, on , wheresoever, &c. to render to the said *A. B.* for his damages, costs, and charges aforesaid. And have you there also this writ. Witness *Lloyd* lord *Kenyon* at *Westminster*, the day of in the 31st year of our reign. *Stormont and Way.*

When the Writ of Error abates.

If plaintiff dies. In a writ of error, if the plaintiff in error dies, the writ shall abate; so if there are several plaintiffs, and one dies, the writ shall abate, *11 Co.* 135. *1 Vent.* 34. because the writ of error is to set persons *in statu quo* before the erroneous judgment given below, and this either before or after errors assigned. *Salk.* 219. But if any of the defendants in error die, yet all things shall proceed, because the benefit of such judgment goes to the survivor, and he is only to defend it. *Bridg.* 78. *Yelv.* 208. *Sid.* 419. *Vent.* 34. *1 Ld. Ray.* 244. But the plaintiff in error must issue a *scire facias* against the executors to hear errors; and then, and not before, may proceed to reverse the judgment. *1 Vent.* 34. *2 Bulstr.* 231. *Show.* 186.

Discontinuance. If he that brings error discontinues before the defendant plead, he may have a new writ of error; but if he discontinue his writ after the defendant hath pleaded *in nullo est erratum* to it, he cannot have a new writ; for then the defendant hath joined issue upon the writ brought; but before plea, he may, for the bringing of the new writ is but the abatement of the former, and noways prejudicial to the defendant.

Chief justice. If error abates by the death of the chief justice, or of the parties, the second writ shall be a *superseas.* *3 Keb.* 466. It is said leave will be given

to take out execution if the chief justice dies.
1 Barn. 139, 140.

The plaintiff in error married, whereby her writ Marriage.
abated; court gave defendant leave to take out execution without time to bring error *coram vobis*.
Str. 1015. *Jenkins v. Bates*. Ibid. 880.

If errors are assigned before defendant's death, the executor must proceed as if defendant was living, till judgment is affirmed, and then revive by *scire facias*; but cannot take out execution pending the writ of error. *Barnes* 347. *Wright v. Trew eke*.

A court of error may award a *venire facias de novo*. *Ven fac. de novo*.
Doughl. 722. *Grant v. Asple*.

If judgment below was given for defendant, upon demurrer, and the judgment be reversed, whereupon a writ of inquiry becomes necessary; in such case, as the lords cannot award such writ, the record is remitted to *B. R.* for them to award the inquiry, and upon return thereof, then to give final judgment.
Ld. Ray. 9, 10. *Carth.* 319.

If judgment on demurrer reversed, *B. R.* to award inquiry.

Of Costs in Error.

By 8 & 9 W. 3. c. 11. If verdict for the defendant, and it is affirmed on error brought, the defendant shall have costs.

But on reversal of a judgment, no costs are allowed, because it would be hard that any person should pay the costs occasioned by error in the judgment of the court below. *Str.* 617. 2 *Mod.* 314.

By 3 H. 7. c. 10. If tenant defendant, or other bound by judgment, sue out a writ of error in delay of execution, and discontinued, be nonsuited or have judgment affirmed, he shall pay costs and damages at the discretion of the justices.

Defendant to pay costs.

Error of a judgment on the statute of usury, on affirmance, it was held, that though no costs were given in the original action, yet the court declared that the defendant in error was entitled to the costs by the express words of 3 H. 7. c. 10. *Str.* 1084.
Ferguson v. Rawlinson qui tam. *Cro. Eliz.* 609.
1 *Vent.* 38.

Though no costs in original action, yet there must be costs in error.

Of quashing writ.

If error be quashed for variance or other defect, costs are given by stat. 4 & 5 *Ann. c. 16. Str. 606.*

If judgment affirmed.

By stat 13 *Car. 2. c. 2.* If error be brought of a judgment after verdict, and the judgment be affirmed, the defendant in error shall have double costs.

Executors.

If an executor brings error upon a judgment against his testator, and after affirmance moves to pay principal, interest, and costs, he shall not pay costs in error. *Str. 1072. Rep. temp. H. 367. 1 Vent. 166. 1 Mod. 77.* But after a *devastavit* he brings error, he shall pay costs on affirmance. *Str. 977. Caswell v. Norman.*

Interest.

On error on a bond given in *India*, B. R. will direct the damages to be computed, by adding to the costs *India* interest (9 per cent.) till signing the judgment, and legal interest (5 per cent.) from that time, on the accumulated sum ascertained by the judgment. *2 Burr. 1094. Bodily v. Bellamy.*

Avowant not intitled to costs.

An avowant is not a plaintiff within 3 *H. 7.* and is not intitled to costs or damages on the affirmance by a court of error of a judgment in his favor. *Carth. 122. 4 Mod. 7. 1 Salk. 95. 205.*

Costs on quashing.

It is said that costs on quashing writs of error are to be given in all cases. *Str. 606. 8 Mod. 305.*

Inrolling Deeds.

How to get a deed enrolled,

THE deed intended to be inrolled must be taken to a judge; if it be a bargain and sale, one of the parties must acknowledge his execution of the deed, either in court or before a judge at his chambers; but if the deed requires the judge's *fiat* only, then the party need not attend; the deed must be left with the judge, who with his own hand delivers it in court to the secondary, and orders him to enroll it; it may be done in term time, or in vacation.

The entry.

As yet of the term of *Saint Michael, 32d Geo. 3.* Witness *Lloyd lord Kenyon.*

England,

England, (fs.) "Be it remembered, that on the 10th day of *November*, in this same term, before the lord the king at *Westminster*, Sir *William Henry Ashurst*, knight, one of the justices of the lord the king, before the king himself, came into the court of the said lord the king, before the king himself, and recordeth, that on the ^a day of *1791*, ^a The day of the acknowledgment of the deed.
at *Serjeant's Inn*, in *Chancery-Lane*, *London*, came *A. B.* in his proper person, and brought before the same justice then there, a certain indenture, which he acknowledged to be his deed; and prayed that the same indenture might be inrolled of record in the said court as his deed; which said indenture the aforesaid justice, by his own proper hands, hath now delivered into court here, to be inrolled, and it is inrolled in these words, to wit, this indenture (here insert the deed *verbatim*, copying every word, with the names of the parties, and making the following mark for seals, ✕, put the sealing and delivery with the witnesses names also). When copied and examined, these words are to be indorsed upon the deed,

"Enrolled in the court of our lord the king, before the king himself, of *Michaelmas term*, in the 32d year of the reign of king *George the third*." Roll 560.

Then a docket of the deed is to be made upon a slip of paper in this form :

The entries of *J. K.* gentleman, one, &c. of the term of *Saint Michael*, 32 *George 3d*, 1791.

Middlesex, (fs.) Indenture of bargain and sale, Docket, dated the ^a day of *1791*, and made between *A. B.* of, &c. of the one part, and *C. D.* of, &c. of the other part, of ten messuages and six acres of land, with the appurtenances, in the parish of *F.* in the said county. Roll 560.

I N D E X.

Abatement.

OF pleas in abatement *Page* 39
 The like to the jurisdiction *ibid.*
 To the disability 40
 On a plea of *misnomer* if issue be
 joined thereon, the judgment
 is peremptory *ibid.*
 Pleas to the jurisdiction or in
 abatement, to be pleaded be-
 fore rule out 239
 And not after imparlance, unless
 declaration be delivered after
 term, or so late in term that
 defendant is not bound to plead
 to it that term, in both which
 cases to plead within the first
 four days of next term in-
 clusive *ibid.*
Sunday not reckoned a day, unless
 as the last. Then *Monday* will
 do 240
 The days are *both* inclusive *ibid.*
 Plea filed too late, court gave
 leave to plead general issue. *ib.*
 If defendant pleads in abatement
 he dispenses with the rule to
 plead *ibid.*
 A plea to the jurisdiction, must
 state another 241
 Cannot be pleaded before ap-
 pearance or *C. B.* filed *ibid.*
 And declaration must be taken
 out of the office *ibid.*
 The rules laid down for this plea
 prior to its being pleaded, *ib.*

No advantage can be taken of the
 declaration, on this plea

Page 241

No need to lay a *venue* 242
 Cannot plead two dilatory pleas
ibid.
 If judgment for the plaintiff it is
 peremptory. 241
 If he omits to plead a *misnomer* in
 his name, he may be taken in
 execution 242
 Must be signed by counsel *ibid.*
 May amend after plea, on pay-
 ment of costs *ibid.*
 How to enter a *caſſetur billæ* *ibid.*
 Judgment of *caſſetur billæ* *ibid.*

Pleas in Abatement.

Plea in abatement of coverture
 269
 ——— in the Christian
 name by original *ibid.*
 To be filed *ibid.*
 Affidavit to annex to plea *ibid.*
 Replication to a plea of *misnomer*
 in the surname, that the defend-
 ant is known as well by one
 name as another 270
 Partnership pleaded in abatement
ibid.

By Death.

When no alteration made by death
 of either party, no abatement
 633
 If plaintiff or defendant die after
 interlocutory judgment, action
 shall not abate if the suit could
 have

I N D E X.

have been originally maintained by the executors	Page 442
If two or more plaintiffs sue, the death of one shall not abate the action	ibid.
The like if there be two defendants	ibid.
Death of either party between verdict and judgment is not error, provided the judgment be entered up <i>within two terms</i>	633
Death of either party before <i>assize</i> , the suit abates, but if <i>after</i> the <i>assizes</i> , though before trial, it does not	634
In ejectment defendant died between the first day of the assizes and verdict; judgment good	ibid.
Ejectment against baron and <i>feme</i> , baron dies between the day of <i>nisi prius</i> , and the <i>day in bank</i> , it is good against the <i>feme</i>	ibid.
If <i>feme</i> takes husband after verdict, and before the day in bank, she shall have judgment, but a <i>sci. fa.</i> may be sued out	ibid.
If pending an argument plaintiff die, suit does not abate; the like if defendant die	ibid.
If she is sued and takes a husband, the writ does not abate	ibid.
Marriage after suit in an inferior court, pleadable in abatement in the superior court after removal	635
If there are two suits pending for the same cause of action, the second suit shall abate	ibid.
How to proceed in such case	ibid.
Bankruptcy in plaintiff or defendant no abatement	401
Abatement of error	710.
Account	11.
<i>Ac etiam</i> .	
Why first introduced	36
<i>Ac etiam</i> in case	120
— debt	ibid.
<i>Ac etiam</i> in trover	Page 120
— detinue	ibid.
— covenant	ibid.
— assault	ibid.
Against three defendants severally	ibid.
For <i>crim. con.</i>	ibid.
At suit of executors	ibid.
At the suit of administrator in case	ibid.
Ats. assignee of a bankrupt	ibid.
For foreign money	ibid.
<i>Actions.</i>	
What an action is	9
If two actions are brought where one would have done, court will consolidate and compel plaintiff to pay costs	ibid.
Actions popular, why so called	10
When statute need be set out	ibid.
When not	ibid.
If act be recited, the day, &c. must be shewn	ibid.
If the plaintiff recites so much as makes for him, it is sufficient	ibid.
Of real actions	11
Of personal actions	ibid.
Of mixed actions	ibid.
Of the action of account	ibid.
— plea	12
— <i>assumpsit</i>	ibid.
What is an <i>assumpsit</i> in law	13
Of a promise, and the consequence in not performing it	ibid.
Of the statute of frauds respecting promises	14
<i>Nudum pactum</i>	ibid.
Consideration defined	ibid.
Void promise	15
Unlawful consideration	ibid.
Of implied contracts	ibid.
— <i>assumpsit</i>	16
Of the action for money had and received	ibid.
The benefit of the action	ibid.
Defence	17
The disadvantage of the action	ib.
When	

I N D E X.

When it lies, and when not	Page 17	Of the action of assault	Page 25
If an annuity bond is not registered, money had and received will not lie against a security	ibid.	_____ battery	ibid.
It lies for premiums paid by the insured, to the lottery office keeper, but not to recover back winnings	18	_____ costs	ibid.
For a creditor's share under an order of commissioners of bankrupt	ibid.	_____ assault and false imprisonment	ibid.
It lies for money paid by mistake	ibid.	Cafe	ibid.
Of the action for money paid	ibid.	May be brought against a sheriff by the assignees of a bankrupt	24
Stock jobbing transaction	ibid.	The declaration, what it ought to shew	ibid.
Partners	ibid.	Plea	ibid.
Of the action of covenant	19	<i>Detinue</i>	25
When covenant lies and when not	ibid.	Declaration	ibid.
When by an executor	ibid.	Proof requisite	ibid.
_____ heir	ibid.	<i>Trespass</i>	ibid.
_____ assignee	ibid.	<i>Who may maintain this action for personal property</i>	ibid.
When against executors, &c.	ibid.	_____ real property	26
_____ heir or assignee	20	If cause of action accrued before bill filed, it is good, though writ issued before	ibid.
Lessee of tithes	ibid.	If two causes of action be of same nature, may be put in one action	ibid.
When assignee shall not be liable	ibid.	When actions may be joined	27
<i>Debt.</i>		<i>For whom and against whom an action will lie</i>	ibid.
In what cases debt lies	ibid.	Caution how to commence actions if plaintiff be an infant, idiot, feme covert, executor	ibid.
When not	ibid.	If joint tenant or tenant in common	28
It lies against sheriff	21	What persons may be sued	29
It lies on a foreign judgment	ibid.	<i>Within what time actions are to be brought</i>	30
For a penalty on a bye-law, &c. or act of parliament	ibid.	Limitation of suits on what founded	ibid.
It lies not on a bill of exchange or promissory note	ibid.	No writ of right of ancestor but within sixty years	ibid.
How to declare for goods sold	ib.	Nor of his own but within thirty	ibid.
In debt may recover less than the demand	ibid.	Claim to prevent statute	ibid.
Court will not stay proceedings on payment of the penalty	22	All writs of formedon shall be sued within twenty years next after title first descended	ibid.
The penalty is merely a security, and where it is not sufficient the plaintiff may recover damages as well as the penalty	ibid.	Upon penal statutes by informers	10
<i>Trover</i>	25.		

I N D E X.

- to be brought within one year Page 30
- At the suit of the king only, in two years 31
- Words, two years ibid.
- This does not extend to *scand. magn.* ibid.
- Trespass, assault, battery, &c. four years ibid.
- What is out of the statute 31
- All actions of trespass *quare clausum fregit*, trespass, detinue, trover, replevin, &c. to be brought in six years, except infants, *feme covert*, &c. ibid.
- Their limitation after judgment or outlawry reversed ibid.
- What actions are not within the stat. of 21 Jac. 1. c. 16. 32
- When the time begins to run and when not ibid.
- Actions upon promissory notes to be brought within the time appointed for actions on the case ibid.
- All suits in the admiralty, in six years 33
- A bill of *Middlesex* or *latitat* being sued out within the time limited saves the statute ibid.
- Administrators. Vide Executors.* 367
- Affidavits of Debt.*
- What an affidavit is 99
- What it is to contain ibid.
- Must set forth the matter positively ibid.
- Debt must be 10*l.* to hold to bail and require a positive oath *except* executors, &c. ibid.
- When to be filed 100
- Who may make affidavit of debt ibid.
- Cannot join action in debt and case in one affidavit ibid.
- Judges to empower persons to take them ibid.
- Who to be sworn before ibid.
- This court will not receive a supplemental affidavit Page 100
- In what cases affidavit is not sufficient to hold to bail 101
- In what cases it is sufficient where plaintiff sues as executor, &c. 102
- On the lottery act 103 & 4
- All affidavits taken by illiterate persons must be read and expressed in the jurat by the commissioner 104
- The Form of Affidavits.*
- For work done and materials found 105
- For goods sold and delivered ibid.
- For money lent ibid.
- For money laid out ibid.
- For money had and received ibid.
- Upon an account stated ibid.
- For work done and materials found; for goods sold and delivered; money laid out, lent, money had and received ibid.
- For goods sold and delivered by partners ibid.
- For goods sold and delivered made by plaintiff's servant ib.
- For work done by plaintiff and his servants 106
- For the hire of horses ibid.
- For work done as a surgeon ib.
- For medicines found as an apothecary ibid.
- For depasturing cattle ibid.
- For the use and occupation of a house and land ibid.
- The like of a messuage ibid.
- For part of a messuage ibid.
- For arrears on lease 107
- For a gelding fold ibid.
- For meat, drink, washing, &c. ibid.
- To hold an administrator to bail after devastavit returned ibid.
- Drawee against drawer on note of hand ibid.

Indorsee

I N D E X.

Indorsee against drawer *Page* 107

Indorsee against the indorser *ibid.*

Drawee against drawer, on note where part paid 108

Affirmation of a quaker on note *ibid.*

Drawer against acceptor on a bill of exchange *ibid.*

Indorsee against acceptor *ibid.*

Indorsee against drawer when payable to his own order *ibid.*

In trover for goods *ibid.*

Trover for a promissory note *ib.*

The like for a bond 109

What affidavit is sufficient in *trover* *ibid.*

The like for deeds generally *ib.*

In detinue for an indenture *ibid.*

On bond obligee *v.* obligor *ibid.*

On assignment of bond by assignee and case thereon *ibid.*

The like when the obligee joins with the assignee 110

On a judgment recovered 111

On an annuity bond *ibid.*

By the assignee of a bankrupt upon an account stated *ibid.*

One of three assignees may make affidavit to hold to bail *ibid.*

By an executor for goods sold and delivered 112

On a note, by ditto *ibid.*

For a violent assault *ibid.*

The like 113

This affidavit should be made by the defendant and a witness:

Mr. J. Gould refused an order on the plaintiff's own affidavit.

For not delivering goods pursuant to a bill of lading 113

On a bond made in *Scotland* 114

Against an underwriter on a policy *ibid.*

Affidavit of due execution of articles 73

The like of service 74

For other affidavits, see the different heads.

Amendment.

The court will allow amendments to be made at any time whilst the suit is depending, though the record be made up, and term *past* *Page* 247

The statutes relating to amendments *ibid.*

Only extend to pleadings of record *ibid.*

In general process may be amended *ibid.*

May amend declaration on payment of costs, without impairment *ibid.*

In matters of form, after plea, without costs *ibid.*

In substance not *ibid.*

When no new rule to plead necessary *ibid.*

Cannot add a new count after plea or after the end of second term 248

Two days after amendment to plead *ibid.*

Cannot amend by adding two counts, the term next after the term, in which declaration delivered *ibid.*

Court refused to amend in dates and sums four years after action brought in an action for usury *ibid.*

May file a new bill to amend by *ibid.*

Amendment after demurrer and argument *ibid.*

Although record made up *ibid.*

After demurrer and amendment, two days to plead *ibid.*

Replication amended after verdict, by inserting the similiter *ibid.*

Bill may be filed at any time before plea, during the term *ibid.*

It was amended by adding a promise to the executors after two terms,

I N D E X.

- terms, otherwise statute would have run Page 249
- Declaration on *qui tam* for usury, may be amended ibid.
- Leave was given for plaintiff to withdraw his replication, and reply *de novo*; to prevent an obliteration on the roll, six terms after ibid.
- If on an entry to avoid a fine the demise is laid *before the entry*, instead of *after*, it may be amended on payment of costs ibid.
- Term in an ejectment amended without consent ibid.
- Plaintiff declared as an executor on a promise to the testator, statute of limitations was pleaded, and issue joined, leave was given to amend on payment of costs, and liberty to plead *de novo* ibid.
- A bill of *Middlesex* filed of wrong term, may be amended ibid.
- The distinction of amendments granted by the court ibid.
- After argument on demurrer, and before judgment, leave was given to amend 250
- Pleas and replications may be amended ibid.
- After verdict on some issues, and demurrer argued, cannot withdraw the demurrer ibid.
- Plea cannot be amended after demurrer, if plaintiff has lost a trial ibid.
- Variance between name of attorney in the warrant and memorandum of issue, amended after error brought, and that assigned for error ibid.
- Verdict on first issue, and no notice taken of the last, after error and joinder in the House of Lords, amended by this court by the judges notes ibid.
- Another amendment after error ib.
- Continuances are amendable Page 250
- Ca. sa.* amended after executed in the return 251
- Appearance*, vide *Original* 500
- Arbitration.*
- The definition of the word 646
- Merchants, &c. desiring to end controversies by arbitration, may agree their submission to the award of any person, and make their submission a rule of court 647
- In case of disobedience, the party neglecting is liable to be attached ibid.
- When to move to set it aside, and on what grounds ibid.
- Unless such award shall be set aside before the last day of the next term after it is made, it is too late ibid.
- The only ground to impeach an award is collusion, or gross misbehaviour of the arbitrators; otherwise it is binding 648
- When motion ought to be made ibid.
- Awards are now considered with greater latitude than formerly ibid.
- As to costs ibid.
- How to proceed to make the submission a rule of court ibid.
- Affidavit of the due execution of the bond for that purpose 649
- How to proceed to get an attachment ibid.
- Affidavit of the attendance, demand, and refusal ibid.
- There must be a positive affidavit of personal notice and demand all at one time 650
- If the party on whom the demand is absconds, how to proceed ibid.
- How to move for the attachment ibid.
- How

I N D E X.

- How to proceed on a rule of reference *Page 650*
 How to get the time enlarged 651
 How to proceed after award made *ibid.*
 Affidavit of the service of the rule, *allocatur* for costs, and demand of the money awarded 652
 Affidavit of the due execution of the award, to be made by one of the witnesses *ibid.*
 Cannot arrest on attachment, on *Sunday* *ibid.*
 When bail is given in the action, and the plaintiff takes a verdict subject to the reference, how he is to proceed after award made 653
- Arrest.*
- Definition of 87
 None to be held to bail in a superior court under 10*l.* *ibid.*
 And if the cause of action amounts to 10*l.* affidavit is to be made of the cause of action, and the sum indorsed on the back of the writ *ibid.*
 For which the sheriff is to take bail, and no more *ibid.*
 If no affidavit made, defendant not to be arrested 88
 The arrest cannot be made on a *Sunday* except on an escape or by bail *ibid.*
 No sheriff, &c. in *Wales*, or counties palatine, to arrest, unless the cause of action be 20*l.* *ibid.*
 No person to be held to bail in any inferior court under 10*l.* *ibid.*
 Proceedings therein in causes of 10*l.* or upwards, and in causes of 40*s.* or upwards 89
 No seaman shall be liable to be taken out of his majesty's service, otherwise than for some criminal matter, unless the debt amounts to 20*l.* 89
- If arrested for a less sum, may be discharged by a judge *Page 90*
 Plaintiff may, upon notice given to seamen, proceed to judgment and outlawry *ibid.*
 Who is within the act 91
 No volunteer soldier liable to be arrested, unless for a real debt of 20*l.* *ibid.*
 Oath of the debt to be made before a judge, &c. *ibid.*
 But plaintiff may, upon notice given, proceed to judgment and outlawry 92
 Who are within the act, and who not *ibid.*
 May be surrendered by their bail, though not arrested *ibid.*
 If any person procure another to be arrested at the suit of any person where there is no such person known, or without the plaintiff's consent, every person so offending shall suffer six months imprisonment *ibid.*
 For what a person may be held to bail of course 93
 When executors, &c. *ibid.*
 Trover *ibid.*
 So in 26 *Geo. 2. c. 21.* *ibid.*
 So in 11 & 12 *W. 3.* for exporting of wool *ibid.*
 So on *scand. magn.* *ibid.*
 If *nonprossed* on a former action if costs are paid, he shall be held to bail to a second action 94
 In a judgment if bankrupt neglects to plead his bankruptcy *ibid.*
 On an award *ibid.*
 When for a penalty *ibid.*
 Bail is required upon the 9th *Ann. c. 14.* against the winner *ibid.*
 Defendant may be held to bail on the judgment, if no bail in the original action, notwithstanding a writ of error brought *ibid.*
 So in an action for double rent 95
 In what actions defendant cannot be held to bail *ibid.*

I N D E X.

What persons are not liable to be arrested Page 96

Bankrupt is free forty-two days from arrest, provided he was not in custody at the time 97

Servants of peers and members not protected *ibid.*

Corporations *ibid.*

If the wife be arrested *ibid.*

If executor personally promise to pay may be arrested *ibid.*

In what cases the defendant may be held to bail a second time 98

As if a second writ be taken out pending the first *ibid.*

But where the bail were forsworn held they might *ibid.*

After nonpros and costs paid *ibid.*

So where the action is misconceived *ibid.*

But if bail justify and a rule to discontinue, cannot without leave arrest anew *ibid.*

Arrest of Judgment.

Arises from intrinsic causes on the face of the record 353

After verdict court will do all they can to help declaration 354

And suppose all right, &c. but not after judgment by default *ibid.*

The roll to be brought into court *ibid.*

Motion may be made any time before judgment signed *ibid.*

After judgment on demurrer cannot move *ibid.*

It may be made after motion for a new trial *ibid.*

Each party pays his own costs, if the judgment is arrested *ibid.*

After verdict, court will over-rule an objection which they would have listened to on demurrer *ibid.*

Mistake in joining the issue was over-ruled *ibid.*

May alledge any thing in the record, in arrest of judgment,

which may be assigned for error

If rule discharged, how to proceed Page 354 355

Affault 22.

Affault and Imprisonment *ibid.*

Assumpsit 13 to 18.

Attachment.

When an attachment is to be refused by the court on motion 85

How to move for an attachment for not paying costs, for not proceeding to trial 316

For not paying money pursuant to an award *ibid.*

Attachment of privilege *ibid.*

Attornment.

Attornment of tenant under a writ of possession in ejectment 570

Attornies.

The definition of 54

Formerly made by letters patent *ibid.*

If an attorney convicted of forgery, &c. shall practise, judge has power to transport 55

No person to act as an attorney or sue out any writ, &c. without being sworn and inrolled in one of the courts *ibid.*

Any judge before admission to examine as to his fitness *ibid.*

Admission to be written on parchment 56

The like as to solicitors *ibid.*

None to act unless bound by contract for five years *ibid.*

Judge to examine *ibid.*

The like as to solicitors *ibid.*

An attorney if in any of the courts may with consent, &c. sue in any other court 57

Not

I N D E X.

- Not to have more than two clerks Page 57
- Secondary may have three ibid.
- Attorney of this court may carry on proceedings in *Wales*, in the name of an attorney of that court by consent ibid.
- Sworn attornies permitting those that are not so, to issue out writs in their name, disabled ibid.
- To be inrolled : *It should have been* the chief clerk ibid.
- A sworn attorney may be admitted a solicitor ibid.
- Any person in his own name suing out a writ, &c. as an attorney or solicitor, and not inrolled, forfeits 50*l.* 58
- Articles cancelled by order ibid.
- A quaker having served five years may be admitted ibid.
- The oath ibid.
- No attorney being a prisoner to commence any action ibid.
- And an attorney permitting him to use his name whilst in prison, to be struck off 59
- Not to extend to suits before confinement ibid.
- He may commence an action on the bail bond ibid.
- The act relates to prosecutions, not a defence ibid.
- Persons bound to serve as clerks to attornies, are to cause affidavit to be made within three months after execution of contract ibid.
- None to be admitted attornies before such affidavit produced ib.
- No attorney to take a clerk after discontinuing business 60
- The clerk to be employed the whole time of service by such attorney, &c. ibid.
- If before the expiration of the time the attorney die, or the clerk be discharged by rule, and he is bound by another contract, such service to be good, if affidavit be made and filed within three months Page 60
- Before admittance affidavit to be made and filed of the service for five years 61
- Attorney acting as agent, or permitting his name to be used, or sending any process to an unqualified person, thereby to enable him to appear or act as an attorney, to be struck off the roll ibid.
- None to act as solicitor at the sessions who are not admitted according to 2 *Geo.* 2. ibid.
- Persons exempted 62
- An attorney not attending his employment for one year, (unless hindered by sickness,) not allowed privilege ibid.
- Attornies dismissed from one court, be not admitted to practise in another ibid.
- It is said he is intitled to his privilege till he remains of record; but I think not, if he discontinues his practice a year ibid.
- Not to be lessee in ejectment 63
- No person to change his attorney without leave ibid.
- Nor till the bill be paid ibid.
- Where the attorney dies, and no other retained, the cause may proceed ibid.
- How long an attorney's authority continues ibid.
- He is not compellable to appear, but if he undertakes he must ibid.
- Alphabetical book to be kept by the master, to enter the names and places of abode of the attornies ibid.
- If no entry made, fixing notice up in the office, deemed sufficient ibid.
- As to the service 65
- Certificates to be taken out annually by every solicitor practising 66

- tising in any court holding plea for 40s. and upwards *Page 65*
 Those residing in *London* and *Westminster*, the bills of mortality, or *Edinburgh*, to pay 5*l.* for a certificate *ibid.*
 Any other part 3*l.* *ibid.*
 From 1st Nov. 1785, every acting solicitor, &c. shall annually deliver in a note of his name and residence, &c. in order to obtain a certificate *ibid.*
 Officers to enter on application in rolls or books for 1*s.* and to subscribe their names on the certificate 66
 Entering officers to issue annual certificates, which must be renewed *ten days* before the expiration of the time for which it was granted, and so yearly 67
 Persons residing 40 days in a year within the limits of the higher duties, are to pay same *ibid.*
 Penalty of 50*l.* on acting without certificate, or giving in a false place of residence *ibid.*
 Persons having taken out certificates, may act for others who have also taken them out 68
 Persons under one certificate may act in any other court in which he is sworn, &c. *ibid.*
 Where country attornies are concerned in causes, declarations, &c. to be delivered to the agents in town *ibid.*
 If the agent of plaintiff's attorney gives the agent in town for defendant time to plead, the country attorney cannot sign judgment till that time be expired *ibid.*
 Notice of trial must be given in town, but a countermand may be given in the country *ibid.*
 No under-sheriff, sheriff's clerk, &c. shall be an attorney during the time that he is in office with any such sheriff *Page 68*
 Attornies for ill practice, &c. liable to be punished in a summary way *ibid.*
 Also for base and unfair dealings 69
 An attorney's name set without his authority to process, proceedings set aside *ibid.*
 Cannot be bail or lessee in ejectment *ibid.*
 Not compellable to serve as constable *ibid.*
 Payment to an attorney *ibid.*
 To the agent *ibid.*
 An action lies against an attorney for neglecting to charge a person in execution *ibid.*
 An attorney may detain writings till paid, but cannot detain deeds delivered upon special trust, for the money due in that business 70
 If a man has a joint cause of action against two, and one an attorney and the other not, he may arrest both *ibid.*
 He has a lien on the money recovered for his bill; if it comes to his hands, he may retain; if he applies to the court, they will prevent its being paid over till his demand is satisfied *ibid.*
 But he must give notice before *ibid.*
 Verdict for 20*l.* error brought, the plaintiff compromised for 10 guineas for debt and costs, and upon motion why defendant should not pay plaintiff's attorney's bill, it was denied *ibid.*
 An attorney was ordered to pay costs, having joined in an affidavit to support a frivolous complaint *ibid.*
 If an attorney has been struck off the roll and called to the bar, not to be put on again, without leave 71

I N D E X.

- If he be struck off at his own request *Page 71*
 An attorney fixed *ibid.*
 If arrested by *latitat*, and be of this court, he may apply to be discharged on *C. B.* *ibid.*
 When must plead his privilege *ib.*
 An attorney convicted of *felony*, struck off *ibid.*
 Court will oblige him to deliver up deeds, on satisfaction of his lien, though he be a steward *ibid.*
 They are to be governed by the master *ibid.*
 Not bound to discover and give in evidence the contents of a deed shewn by his client, nor can he be forced to act against his will *ibid.*
 But not privileged from giving evidence of collateral facts *ib.*
 Rules necessary to be known by practisers *ibid.*
 New rules respecting the service of clerks, and their future admission 72
 How to proceed to file articles of clerkship 73
 Affidavit of due execution of articles of clerkship *ibid.*
 Of service 74

Of taxing their Bills 478.

Attornies.

Proceedings by Attornies.

- If he sues by original he waives his privilege 471
 Or if he sues in another name *ibid.*
 How to sue by attachment of privilege *ibid.*
 An attorney suing out an attachment of privilege against any defendant, to leave a *præcipe* with the signer of the writs, &c. 472

- Attachment of privilege *Page 472*
 If defendant appears he files common bail with Mr. *Walter* 473
 Declaration ats. of an attorney *ibid.*
 Venue *ibid.*
 When the defendant is to plead *ibid.*

Proceedings against Attornies.

- Cannot be arrested 474
 How to proceed *ibid.*
 An attorney of *C. B.* must put in bail on arrest in this court *ibid.*
 If arrested, and he is an attorney of this court, common bail *ib.*
 If by special original he is arrested, he must plead 475
 A bill filed in vacation, good, but no costs allowed if settled before the ensuing term *ibid.*
 How to proceed *ibid.*
 When he is to plead *ibid.*
 A copy left with known agent, good *ibid.*
 The bill *ibid.*
 The indorsement on the back to plead *ibid.*
 With whom the bill is to be filed *ibid.*
 A plea must be demanded after rule entered *ibid.*
 How to make up the issue if he pleads, and what to pay *ibid.*
 If arrested in inferior may have a writ of privilege *ibid.*
 The form of a writ of privilege to an inferior court 477

Of taxing their Bills.

- Attornies not to commence an action for fees, until one month after delivery of their bills 478
 Judges may refer them to be taxed *ibid.*
 If it appears he has been overpaid 479
 If less than a 6th part be taken off, to pay the costs *ibid.*
 If

I N D E X.

If not less by a 6th, the client to pay costs *Page 479*

Not to extend to any bill of fees, between one solicitor and another *ibid.*

May be wrote with abbreviations *ibid.*

Method to oblige an attorney to deliver his bill *ibid.*

How to proceed to tax it *ibid.*

If bill be delivered and attorney dies, a 6th is taken off, executor pays no costs *480*

Cannot be charged without leave of court *ibid.*

Bill cannot be taxed at the trial *ibid.*

If an attorney means to set off his bill, he must deliver it in term, so as it may be taxed *ibid.*

A bill for conveyancing and parliamentary business, as also causes in this court may be taxed *ibid.*

If the whole be for conveyancing cannot *481*

Business done at quarter sessions, court will not refer it *ibid.*

Bill need not be signed in this case *ibid.*

An attorney's costs taxed, must be paid before plaintiff can make a set-off in an action against him by the defendant in the former action *ibid.*

A case where an agent's bill taxed *482*

Executor may bring action for bill without its being signed *ibid.*

But such bill may be referred *ib.*

Bail, Common.

AT common law both must have appeared in person *161*
Who now must *ibid.*
Appearance, first act the defendant does *ibid.*

Now reduced to mere appearance without sureties *Page 161*

To be filed in ejectment *ibid.*

An attorney to appear if he undertake *ibid.*

Must be filed in eight days after return of process *ibid.*

A warrant or memorandum to be filed with the bail piece *162*

The form of the warrant *ibid.*

Common bail piece *ibid.*

To be filed on a judgment by default, or *non sum informatus* *163*

To be filed within eight days after the return of process, or plaintiff may do it *ibid.*

Must be filed the term the writ is returnable *162*

Affidavit of the service of writ *163*

Before whom to be sworn *ibid.*

May be filed by plaintiff according, &c. without a memorandum or minute *ibid.*

Must be filed by the plaintiff before he can declare in chief *164*

In what cases common bail will be ordered *ibid.*

Filing common bail voluntarily is invalid, unless a writ be sued out within 14 days *165*

If baron and feme are sued, the baron must appear for himself and wife *ibid.*

If the writ be served in the wrong name, and defendant file bail in his right name, you may declare against him in his right name *ibid.*

It must be filed on entering up a judgment on warrant of attorney *ibid.*

If an attorney undertakes to appear in writing, the court will order him so to do, or in default grant an attachment *165*

Bail, Special.

The definition of the word *152*
No

I N D E X.

No attorney to be bail *Page 132*
 The reason why called bail *ibid.*
 Bail and mainprize, the distinction

133

Special bail, who *ibid.*
 How to proceed, when bail has
 been given to the sheriff *ibid.*
 May be put in for the purpose of ren-
 der, before return of writ *ibid.*
 So by attorney in consequence of
 his undertaking, or by the sheriff

ibid.
 No attorney, nor his clerk, to be
 bail *ibid.*
 If they do, and no exception, good

134

No sheriff's officer, &c. shall be
 bail *ibid.*
 No persons outlawed, or keeper
 of prisons, to be bail *ibid.*
 When to put in, in *London* and
Middlesex *ibid.*
 How to put in special bail by bill

ibid.
 Memorandum to be delivered on
 putting in special bail to the
 judge's clerk *ibid.*

The form of such memorandum or
 warrant *135*

Husband to put in bail for himself
 and wife *ibid.*

She is to be discharged if taken
 before the husband *ibid.*

Special bail piece *136*

Where to be put in *ibid.*

Condition of the recognizance
ibid.

Notice to be given of its being
 put in *ibid.*

Notice of bail *ibid.*

Of Exception.

If plaintiff be dissatisfied, he may
 except against them *within 20*
days *137*

When to justify after exception
ibid.

Exception to be in writing *ibid.*

Notice of exception *ibid.*

Within what time to justify
Page 137

Of justifying.

Notice of justifying same bail as
 put in *138*

If not done at sitting of the court,
 must wait till its rising *ibid.*

When bail are out of court *139*

Of adding Bail.

How to add fresh bail and justify
ibid.

Notice of adding and justifying
 two other bail *ibid.*

Notice of one being added, and
 that he, with the other already
 put in, will justify *140*

How to justify *ibid.*

Affidavit of the service of the no-
 tice *141*

The like on the clerk or servant
ibid.

Attorney may consent *ibid.*
 Bail being put in by one attorney,
 no other shall give notice to jus-
 tify without leave *ibid.*

If one excepted to, and another
 added, the former may be struck
 out *ibid.*

A notice that *A. B.* and *C.* or two
 of them will justify, bad *142*

The street ought to be named *ib.*

Of opposing Bail.

On what grounds bail may be re-
 jected *ibid.*

Of putting in bail in the county
143

The chief justice may empower
 persons to take bail *ibid.*

And may make rule for justifying
 by affidavit *ibid.*

Defendant has six days to put in
 bail *ibid.*

The bail piece must actually be
 filed on the sixth day *ibid.*

How to put it in before a com-
 missioner *144*

Affidavit

Affidavit of the due taking

Page 144

Affidavit of the justification *ibid.*

Before whom to be sworn *ibid.*

How to file the bail piece *ibid.*

Notice of putting in and filing *145*

Within what time to except *ibid.*

How to justify *ibid.*

Within what time bail piece to be filed *ibid.*

If the plaintiff be dissatisfied with the bail taken by the sheriff upon the arrest, he may except against them, and rule the sheriff to compel a justification *146*

Bail justifying after rule to bring in the body expired, too late.

Vide p. 160. *ibid.*

Bail taken before or on continuance day, to be filed of the preceding term *147*

If no exception is made within a proper time, defendant may make affidavit of the service of notice, and file same *ibid.*

Bail excepted to, and not struck off the bail piece, may apply for an *exoneretur* *ibid.*

In vacation a prisoner may justify before a judge *ibid.*

What is a waiver of bail *ibid.*

What will discharge them *ibid.*

Bail, Proceedings against. *Vide Scire facias 446.*

Bail Bond.

In London or Middlesex no bond can be put in suit, until four days after return of writ *148*

Country six days *ibid.*

Lat. returnable *Wednesday* cannot be assigned till *Monday* *ibid.*

The four days are one *inclusive*, the other *exclusive* *ibid.*

If fourth day happen on *Sunday*, all the next day to put in bail *ibid.*

If the plaintiff has accepted the

bond, he cannot proceed against the sheriff *Page 148*

The sheriff, on request, is to assign the bond *ibid.*

If plaintiff die before assignment, proceedings after will be set aside *ibid.*

Before taking the bond, plaintiff ought to be satisfied with the bail *149*

How to get the assignment *ibid.*

Action on the bond *ibid.*

An attorney waives his privilege by entering into a bail bond *ibid.*

When the bond shall stand as security, although no proceedings for two terms *ibid.*

Bond shall stand as a security, if plaintiff has lost a trial *150*

The plaintiff had proved his debt under a commission, as bail was not put in pursuant to the condition of the bond, the plaintiff took an assignment (although two terms had elapsed) and was held good *ibid.*

Where the plaintiff might have had judgment against the principal, bail liable, though he die *ibid.*

But where defendant dies, and no laches in him, court will relieve *ibid.*

Nothing is a performance of the bond, but putting in bail *ibid.*

When a bail bond is void *ibid.*

Bail to the sheriff may put in bail and render *ibid.*

Terms on which the court will stay proceedings on the bail bond *151*

If the bond is irregularly assigned, how to proceed to set aside the proceedings *152*

Affidavit *ibid.*

Cannot plead in abatement if proceeding staid *ibid.*

If a rule be made to stay the proceedings,

I N D E X.

ceedings, plaintiff cannot proceed whilst rule is got rid of

Page 152

What is not a waiver of the assignment, *and what is*

153

If defendant has not put in bail in time, and afterwards gives notice that he will put them in to stay proceedings on the bond, plaintiff may except to such bail, and it will not be a waiver of the assignment

152

And plaintiff may oppose, without its being a waiver of the assignment

153

Bankrupt.

Cannot be arrested for forty-two days, if not in custody before commission sued out

97

Bankrupt imprisoned after certificate allowed, how to be discharged

577

How to discharge a bankrupt if in custody, after certificate obtained

ibid.

An execution taken out after certificate signed, and before allowed, is valid

ibid.

Bond and warrant given after the bankruptcy, not barred by certificate

ibid.

Bankrupt cannot be discharged from an extent

578

A bankrupt in custody, on an attachment for the non-performance of an award, discharged on having his certificate

ibid.

A bankrupt may be discharged from a judgment given after his bankruptcy, for a debt due before

ibid.

When certificate is a discharge

ibid.

A certificate under a second commission void

ibid.

If the penalty of an annuity bond is once forfeited before bankruptcy, the value may be prov-

ed, and the certificate is a discharge from future payments

Page 579

But it is no bar to an action for the mesne profits

ibid.

Certificate will not discharge a bankrupt from action on a bail-bond

ibid.

But shall discharge proceedings against bail, in an action upon the old debt, who are not already fixed

ibid.

If the act of bankruptcy be between the time of giving bail in error, and affirmance, no discharge

ibid.

A surety who pays the debt *after* the bankruptcy, is not barred

ibid.

A surety of a bond pays debt *after* bankruptcy, not barred by certificate, and may hold to bail

ibid.

The rule of law respecting the surety of a bankrupt

580

Bankrupt sued as an executor, and pleads a false plea, is liable to costs, certificate before, no discharge

ibid.

If bankrupt is an executor, commissioners cannot seize testator's effects. 3 Burr. 1369.

If cause of action arises before the bankruptcy, interest, &c. since are discharged

ibid.

How the bail of a bankrupt are to be relieved, on his obtaining the certificate before return of second *sci. fa.*

ibid.

The rule of law

581

If the bankrupt be in the custody of a creditor who has proved his debt, he may petition for him to elect

ibid.

The petition

ibid.

How to proceed upon it

582

Bargain and Sale.

How to inroll such deed

712

Baron

I N D E X.

Baron and Feme.

If process be against baron and feme, service on the husband is sufficient for both; and if the husband does not appear for himself and wife, plaintiff may for them

Page 131

If the wife be arrested on process against the husband and her, she shall be discharged

135

If the husband be arrested, and not the wife, he shall put in bail for both, and if she be arrested, she shall be discharged

97

A married woman must sue with her husband

28

And in all cases not to answer without her husband (except she be a feme sole trader in London)

ibid.

When necessary to join the feme in an action, and when not

ibid.

Bill of Middlesex 119.

Brief.

Of what a brief ought to consist

341

The evidence necessary to be stated therein

342 to 347

Certiorari.

Certiorari to certify bill, bail, &c.

679

— warrants of attorney

680

Case, Actions on 22, 23.

Of the Cinque Ports 116.

Circuit.

Court of assize, &c. what

74

When judges are to go the circuit

ibid.

Who they must be

ibid.

Formerly no man could be judge of assize in his own county

75

But now a man may be a justice of oyer and terminer and gaol delivery within any county

Page 75

The judges sit by virtue of five several commissions

ibid.

The description of the word *nisi prius*

ibid.

The several counties in England are divided into six circuits

76

The circuits

ibid.

The officers of the circuit

ibid.

The business of the sheriff and coroner

ibid.

The clerks of assize

77

Cognovit actionem.

The form of a *cognovit* in case

406

The like in debt

ibid.

How to sign the judgment

ibid.

Judgment by *cognovit actionem* in case

ibid.

The like in debt

ibid.

The like against an administrator in debt

ibid.

The like in case

ibid.

Committitur 589.

'Compounding Actions.

Leave to compound denied, where there was no consent

645

Leave given on the statute of gaming

ibid.

Ditto on the statute of usury

646

On compounding a penal action, the king's part to be paid first

ibid.

How to move to compound

ibid.

Concilium 290.

Confession. See *Cognovit*

406

Consolidating of Actions.

If two actions are brought for causes which may be joined, the court will consolidate

9

In ejectment

577

How to consolidate

632

19

I N D E X.

In term *Page 632*
 In vacation *ibid.*
 How to proceed against the others
 in case of nonpayment 633
 If two actions are brought which
 might have been joined *ibid.*

Continuances.

By *wic. non nisi brevis* of the *venire*
 366
 Of the process and judgment *ibid.*

Coroner.

If the sheriffs are parties to the suit,
 then the *venire* must be awarded
 to the coroner 333
 If there is an attachment against
 the sheriff in office, it must be
 left with the coroner 160
 But if against the late sheriffs, it
 may be directed to the present
 sheriffs to attach them *ibid.*
 His fee for attaching the sheriff
ibid.
 To attend the assizes 76

Corporations.

Corporations aggregate, what 490
 May have leave to inspect their
 books 491
 Corporations sole *ibid.*
 Must sue by its name *ibid.*
 Minute variation not fatal *ibid.*
 Corporation aggregate must ap-
 pear by attorney *ibid.*
 It cannot be sued for a battery *ibid.*
 Nor maintain an action for it *ibid.*
 Cannot be committed to prison
ibid.
 It cannot be outlawed *ibid.*
 To compel them to appear, pro-
 ceeding must be by distress *ibid.*
 Must be sued by original *ibid.*
 Proper process against them is by
 distringas 492
 How to proceed *ibid.*
 Member cannot be witness unless
 disfranchised *ibid.*
 In ejectment plaintiff declared on

a demise by a corporation, but
 did not set it forth by deed,
 held good *Page 492*
 Not entitled to an essoin 493

Costs in Error 711.

Costs.

Respecting executors, &c. 348
 How to tax the costs *ibid.*
 May have a rule to be present at
 taxing 349
 Affidavit to increase costs *ibid.*
 The like for not going to trial 316
The counties of England 114
Costs, security for 166
 Now given by foreigners *ibid.*
 As to ejectments *ibid.*

Covenant 19.

Court of King's Bench.

Why courts of justice were esta-
 blished 1
 A court defined *ibid.*
 They are derived from the power
 of the crown 2
 The king is supposed to be present,
 but he is there represented by
 his judges *ibid.*
 For the more speedy administra-
 tion of justice many courts are
 appointed *ibid.*
 What a court of record is *ibid.*
 Only one superior court by the
Saxon constitution *ibid.*
 Why it was stripped *ibid.*
 The *aula regia* stripped of its ju-
 risdiction 3
 Court of *K. B.* the supreme court 4
 A remnant of the *aula regia* *ibid.*
 Usually sat at *Westminster* 5
 It is termed the *custos morum* of the
 realm *ibid.*
 Jurisdiction over all capital of-
 fences *ibid.*
 So high that it keeps all inferior
 jurisdictions within the bounds
 of their authority 6
 The cognizance of all actions ex-
 cept real, and why *ibid.*

I N D E X.

It is the highest court of common law Page 7

Every prison is the prison of this court ibid.

It is a court of appeal from the Common Pleas and all inferior jurisdictions ibid.

It grants a *habeas corpus* to relieve prisoners, and may bail or discharge ibid.

It cannot hold plea in any personal action under 40s. ibid.

For if the debt or damages amount to less than 40s. no costs ibid.

But debt will lie on a *non pros* for 16s. 8

The style of the court ibid.

There are two ways of proceeding ibid.

Holds plea on a writ of privilege ibid.

Attornies and officers to be sued by bill ibid.

Peers and members may also be sued by bill 9

But no writ of summons lies against common persons ibid.

History of the proceedings in this court 33

Of the original writ ibid.

The security found on the original 34

Cannot issue unless debt be 10l. 35

Proceeding by bill ibid.

The bill of *Middlesex*, why so called ibid.

The *latitat* ibid.

Introduction of the *ac-etiam* 36

Defendant's appearance ibid.

Bail 37

Two at least ibid.

Recognizance ibid.

Declaration, the definition of 38

The conclusion ibid.

Defence (what) ibid.

Cannot haveoyer of original writ 39

The different sorts of pleas *P.* 39

Pleas in abatement ibid.

To the jurisdiction ibid.

To the disability 40

How they are got rid of on hearing ibid.

Defendant may confess the action 41

He may do it by paying money into court ibid.

The general issue, what ibid.

Special pleas in bar 42

The qualifications of a plea ibid.

Cannot plead a special plea which amounts to the general issue ib.

Replication 43

Rejoinder ibid.

New assignment ibid.

Averments on an issue taken 44

Demurrer ibid.

What an issue in fact is 45

Continuances to be made ibid.

When a plea of *puis darrein continuance* may be pleaded 46

When not ibid.

Of the writ of *audita querela* ibid.

Plea *puis darrein continuance* cannot be rejected, if verified by affidavit. 47

Venire and distringas ibid.

Nisi prius record 48

Postea ibid.

Party may bring error ibid.

Executions, the different sorts 49

Satisfaction ibid.

Customs.

How to proceed against officers of customs 659

All the regulations in the act touching actions to be brought against excise officers, and others, extend to officers of the customs ibid.

Limitation of actions ibid.

General issue ibid.

Notice ibid.

Debtors in execution 604.

Declar

I N D E X.

Declaration.

DECLARATION is a legal specification of the cause of action Page 167
 How to declare if process be taken out in a wrong name ibid.
 The substantial rules of pleading are founded in strong sense, &c. 168
 Honourable to have the knowledge of pleading ibid.
 General rules respecting declarations ibid.
 Rule for preventing unnecessary length in covenant, slander, on statutes, and debt on judgment 170
 What a declaration in covenant need not state 171
 The objects in pleading are precision and brevity ibid.
 In covenant need not set forth more than necessary to intitle plaintiff to a recovery ibid.
 If more is stated, to be struck out, and costs allowed ibid.
 Variance between the process and declaration, when fatal 172
 May declare *qui tam* though the process be not so ibid.
 Plaintiff (if applied to) to give a particular of his demand ibid.
 Actions to proceed though no memorandum filed 173
 Two ways to declare ibid.
 Defendant's attorney to pay for a copy 174
 How declaration is to be prepared, and what to charge ibid.
 How to be delivered if common or special bail be filed ibid.
 How it is to be delivered if plaintiff appear according to the statute 175
 Of delivering a declaration *de bene esse* where no affidavit is filed of the cause of action upon pro-

cess, returnable before the last return Page 176
 How where an affidavit of the cause of action is filed ibid.
 When intitled to an imparlance ibid.
 Of delivering a declaration by the bye 177
 If special or common bail be filed by defendant, any person may declare against him by the bye *before the end of the next term after return of the process* ibid.
 If the defendant file bail, any other plaintiff may declare by the bye against him, within the term the writ is returnable ib.
 The delivery of a declaration before special bail is put in, is a waiver of the bail; and if before bail be justified, it is an acceptance of them, unless delivered *de bene esse* 178
 If original be sued out in one county, and the declaration laid in another, bail are discharged ibid.
 Within what time to declare ibid.
Non pros ibid.
 How to obtain time 179
 Notice of declaration *de bene esse* ifailable ibid.
 The like on common process 180
 The like upon common process where bail or appearance is filed according to the statute ibid.
 Of intitling and laying the day in the declaration 181
 If it be improperly intitled may be corrected ibid.
 At the instance of both ibid.
 As where a tender is made ibid.
 Defendant has a right to have it intitled agreeable to the true time of delivery 182
 If the cause of action arises in the term, how to lay the day ibid.
 When the day is material ibid.
Trespass,

I N D E X.

- Trespass, assault, &c. day immaterial *Page* 183
- In assault, proof that the assault was on a day after commencement of suit, may be helped *ibid.*
- Declaration for work done and materials found, work and labour generally, goods sold and delivered, money lent, laid out, had and received, and on an account stated 184
- for work and labour with horses, carts, and carriages 188
- for board and lodging 189
- for the use and occupation of a house and land *ibid.*
- for wharfage of goods 190
- The like against an executrix for goods sold and delivered to her testator *ibid.*
- The like ats. an executor for goods sold and delivered 192
- The like ats. an administrator 193
- The like ats. assignees of a bankrupt, for goods sold and delivered by the bankrupt 194
- The like on a note, drawee against the drawer 195
- The like indorsee against the indorser, the drawer refusing payment, by original 196
- The like for payee's partners, against the acceptor, on a bill of exchange by original 197
- The like for the indorsee's partners, against the acceptor, on a bill of exchange drawn by partners, payable to their own order 199
- The like by an attor. for fees 200
- The like on a bond, obligee against the obligor 203
- The like upon a bond given to the wife whilst a feme sole *ibid.*
- The like on bond at the suit of assignees of bankrupt 204
- The like against two executors of executrix on bond *Page* 205
- The like ats. executors by bill 206
- The like in debt upon a judgment recovered by plaintiffs in *K. B.* 207
- Declaration on a *non pro* for the defendant for not declaring 208
- The like on a bail-bond by the assignee of the sheriff against principal 209
- The like against one of the bail 212
- The like for a common assault 215
- For an assault and false imprisonment 216
- The like for an assault and putting out plaintiff's eye with a lighted squib *ibid.*
- Declaration in trover for plate 217
- The like in trespass, breaking and entering the close, eating up and treading down corn with cattle, &c. 218
- For breaking and entering house, making a noise, and doing damage therein *ibid.*
- Deeds.*
- How to inroll a deed of bargain and sale 712
- Entry and docket 713
- Demurrers.*
- What a demurrer in law is 294
- They are general or special 295
- A man who demurs generally shall take advantage of all matters which are requisite to shew a right or title in plaintiff *ibid.*
- If demurrer for form, he must shew special causes *ibid.*
- Cannot demur to declaration, because it says *summoned*, instead of attached *ibid.*
- If defendant demurs generally to the whole declaration, and one count is good and may be joined, judgment

I N D E X.

- | | | | |
|--|----------|---|----------|
| judgment must be for the plain-
tiff | Page 295 | Special dem. may be waived, a
general one cannot | Page 299 |
| If there is a demurrer, may apply
to amend | ibid. | Books to be delivered two days
before argument exclusive one
day, inclusive of the other | ibid. |
| If not, plaintiff's attorney may
make up the book, and how | ib. | When the demurrer book may be
made up by the defendant, and
how to proceed | 300 |
| General demurrer must be signed, | 296 | The rule | 301 |
| Defendant cannot waive the ge-
neral issue and demurrer, nor
waive a general demurrer, and
give a special one; but he may
strike out a special plea or spe-
cial demurrer, and plead the
general issue | ibid. | <i>Discontinuance.</i> | |
| Defendant not bound by a con-
sent to rejoin <i>gratis</i> , if the repl.
affords cause | ibid. | The meaning of the word | 640 |
| Where there are issues in fact and
in law, the plaintiff may waive
the issue in fact, and take out
inquiry on demurrer <i>after argu-
ment</i> | ibid. | After demurrer joined and enter-
ed, cannot discontinue without
moving the court | ibid. |
| Judgment on dem. to one count,
plaintiff may execute inquiry,
without entering <i>nolle prosequi</i> to
the issues | 297 | After issue and verdict | ibid. |
| A general demurrer book, where
the demurrer is to the declara-
tion | ibid. | But before or after declaration,
plaintiff may by side-bar rule,
and how | ibid |
| Joinder | ibid. | <i>Distingas.</i> | |
| Demurrer to a plea | 298 | <i>Distingas</i> against a peer | 485 |
| The like to a replication with
causes | ibid. | <i>Præcipe</i> for ditto | ibid. |
| Leave was given to amend after
argument | 299 | <i>Distingas</i> against a member | 489 |
| Leave was given to amend after
argument and before trial of the
other issues | ibid. | <i>Testatum</i> | 490 |
| How to make up a demurrer book
on a special demurrer | ibid. | What affidavit is to contain, to
sell the issues | 484 |
| If there be an issue as to part, and
demurrer to the other part, the
issue may be tried first | ibid. | The act of 10 Geo. 3. extends to
all writs of <i>distingas</i> | ibid. |
| If plaintiff refuses to join in de-
murrer, how to compel him | 299 | The sheriff now may be ruled to
bring in the body, instead of
being compelled by <i>distingas</i> | 157 |
| If judgment for plaintiff, how to
proceed in case | ibid. | <i>Distingas juratores</i> 47. | |
| If judgment be in debt | ibid. | A common <i>distingas</i> | 333 |
| | | Special ditto | 334 |
| | | For a view | ibid. |
| | | <i>Docketting Rolls.</i> | |
| | | The manner of making the en-
tries | 361 |
| | | Rolls to be brought in | ibid. |
| | | Plaintiff's warrant | 362 |
| | | Defendant's | ibid. |
| | | Nature of the action to be ex-
pressed | ibid. |
| | | What | |

I N D E X.

What term to be entered if on an issue	Page 362	Plaintiff must recover according to the title	Page 352
How on an interlocutory judgment	ibid.	Where ejectment brought there can be no disseisin	ibid.
How on <i>non pros</i>	ibid.	Judgment is for recovery of the possession	ibid.
<i>Post terminum</i>	363	If there be no tenant in possession, how to proceed (except under stat. 4 Geo. 2.)	533
How to docket the rolls	ibid.	How to deliver the lease made on the lands	ibid.
Docket-paper	ibid.	Letter of attorney to execute a lease on the premises	ibid.
No judgment to affect any lands unless docketed	365	The lease	534
Memorial of judgment	ibid.	If no letter of attorney, how to seal the lease	535
Certificate	ibid.	Declaration and notice	ibid.
Affidavit	ibid.	Affidavit	536
Continuances on the roll	366	Of moving for judgment	537
<i>Ejectment.</i>		Any person claiming title may appear	ibid.
A N ejectment an invention for the trial of titles	530	Leaving beer in a cellar is keeping possession	ibid.
The court have every control over them	ibid.	If a person rents ground where there is no house, he must be served, if he is known, where he lives	ibid.
Defendant obliged to go to trial on the merits	ibid.	<i>Of Notice to quit previous.</i>	
The invention of it, for the advancement of justice	ibid.	When notice is requisite, and when not, before ejectment	ib.
Plaintiff and defendant fictitious persons	531	I desire you to quit, &c. or shall insist on double rent, good notice	538
It may be so modelled so as to answer every end of justice	ib.	When intitled to double rent	ib.
Adopted in lieu of real actions	ib.	Custom of <i>London</i> as to notice to quit	ibid.
A possessory remedy, and lessor must shew a right to enter by proving possession within twenty years	ibid.	Defendant held from <i>Michaelmas</i> , and served with notice to quit at <i>Midsummer</i> , plaintiff nonsuited	ibid.
Defendant need not plead the statute of limitations	ibid.	Administrator has the same right to hold as the intestate	539
The confession of lease, &c. bars a nonsuit	ibid.	In case of a tenancy from year to year, there must be half a-year's notice to quit, ending at the expiration of the year	ibid.
But to avoid a fine, there must be an actual entry proved	ibid.	An infant must give notice	540
And the demise cannot be carried beyond the actual entry	ibid.	For what an ejectment lies	ibid.
The formal title of a trustee shall not be set up against a <i>cestui que trust</i>	ibid.	For	
No distinction between a verdict, and judgment by default in ejectment	532		

I N D E X.

For what it does not *Page* 540
 How to proceed where there is a
 tenant in possession 541
 The tenant's wife may be served
 ibid.
 The tenant's son or daughter, when
 they may or not be served ibid.
 To be served before essoign-day
 542
 When to make notice to appear in
 London ibid.
 Country ibid.
 Declaration in ejectment by bill
 ibid.
 The not subscribing the notice with
 the name of casual ejector, no ir-
 regularity ibid.
 Declaration by original 544
 The like on a double demise 545
 How to describe premises for a
 rectory, &c. 546
 The like for a vicarage, &c. 547
 A demise by deed ought to be
 shewn for a rectory ibid.
 How to describe a manor ibid.
 The thing demanded to be stated
 with certainty ibid.
 In what county to be brought 548
 Day of demise ibid.
 If title accrues in *Easter* vacation,
 yet you may deliver declaration
 as of that term ibid.
 To be brought within twenty
 years ibid.
 How to move for judgment ibid.
 Affidavit of the service 549
 Of the defect in the affidavit ibid.
 The clerk of the rules to keep a
 book, and enter the names of
 plaintiff and defendant and first
 lessor 550
 And the rule for judgment to be
 now taken away two days after
 the end of the term in which the
 motion is made ibid.
 How to sign judgment by default
 ibid.
 Of amending the declaration 551
 A verdict cures a defect in setting

out the title, though it cannot
 cure a defective title *Page* 551
 Ejectment open to every equitable
 regulation 552
 Of appearing in town causes ibid.
 In the country ibid.
 If term ends on *Wednesday*, tenant
 has all *Monday* to appear in ib.
 How to appear for the tenant ib.
 Common consent rule 553
 Explanation of the consent rule
 554
 A tenant must give notice to the
 landlord, or forfeit three years
 rent ibid.
 When consent rule is filled up, it
 must be annexed to the plea,
 and if by bill, file common bail
 ibid.
 If by original, enter appearance
 555
 Note of appearance ibid.
 Plea ibid.
 How to appear for part of the pre-
 mises ibid.
Of the appearance by the landlord
 556
 He is now impowered to make
 himself defendant with or with-
 out the tenant by leave of court
 ibid.
 Construction of the act ibid.
 A landlord made defendant, with-
 out his tenant, may bring error
 ibid.
 If motion be made to take out the
 execution after verdict, he is
 then to shew the writ of error
 for cause ibid.
Who are considered as landlords 557
 Parson ibid.
 No man to be admitted unless he
 hath been in possession ibid.
 Heir and lord ibid.
Cestui que trust ibid.
 Heir 558

How

I N D E X.

- How to appear for the landlord* Page 558
- Landlord at trial must confess lease, &c. 559
- If landlord is made a defendant, plaintiff must prove his, the defendant's, tenant in possession *ib.*
- If a verdict be against the landlord, must move to take out execution *ibid.*
- Judgment was by default, it appeared on motion to set it aside, that landlord had no notice of the ejectment from his tenant, court let him in to defend *ibid.*
- Regular judgment set aside *ibid.*
- When time for appearance is out, and there is a plea, how to proceed to make up issue 559
- Issue by bill 560
- Issue by original *ibid.*
- Notice of trial *ibid.*
- If there be an infant who sues in ejectment, he must name a guardian after plea *ibid.*
- The lessor of the plaintiff must give security for costs, though his residence be in *Ireland* *ibid.*
- Where there has been a former ejectment, rule is, to stay proceedings in second, till the costs of the former are paid 561
- How to proceed against tenants that abscond to avoid service of ejectment *ibid.*
- When a declaration in ejectment may be left with the servant, and also on refusal to call the master *ibid.*
- How to make up record *ibid.*
- What a special verdict ought to state 562
- Final judgment after special verdict *ibid.*
- Final judgment on a retraxit of the plea 563
- If plaintiff be nonsuited for want of confessing lease, &c. how the associate is to act 564
- If there be several defendants, and some appear, and others not, how the associate is to act Page 564
- How to proceed after plaintiff is nonsuited on the merits, or on verdict for defendant *ibid.*
- How to proceed if plaintiff be nonsuited for want of confessing lease, &c. *ibid.*
- After nonsuit in this case, cannot take out execution until the day in bank 565
- Same point held lately *ibid.*
- If nonsuited, may pay costs to which defendant he pleases *ib.*
- May have a new trial on proper grounds *ibid.*
- What defect verdict cures *ibid.*
- Execution must be taken out according to right *ibid.*
- If verdict for plaintiff, may have *ca. sa.* or *fi. sa.* for costs 566
- If lessor dies before assizes, and plaintiff be nonsuited, executor shall not have costs *ibid.*
- Ejectment against two, one dies after issue and before trial, death may be suggested *ibid.*
- If lessor dies, cannot be pleaded *puis darrein contin.* *ibid.*
- Of the writ of possession *ibid.*
- Writ of possession by bill on a single demise, and altered for one by original writ of possession, and *fi. sa.* for costs 567
- Writ of possession on two demises 568
- Retraxit 569
- Attornment *ibid.*
- The form 570
- Proceeding under 4 *Geo. 2. c. 28.* where there is half a year's rent due on lease, and the tenant quits, and leaves no sufficient distress *ibid.*
- What affidavit ought to contain 571
- A bill in equity not filed within 571

I N D E X

- six months, there is to be no relief *Page* 571
 If such bill filed, must bring into court all rent, &c. *ibid.*
 If tenant pay before trial all rent and costs, proceedings to cease *ibid.*
 Construction of the act 4 *Geo.* 2. *ibid.*
 Upon service of declaration, tenant may apply for leave to pay rent and costs 572
 How to prepare declaration *ibid.*
 Affidavit to move for judgment *ibid.*
 How to move 573
 If tenant appears and pleads upon trial, the landlord must prove all the matters stated in his affidavit *ibid.*
 When the landlord may enter to deliver such declaration *ibid.*
 Actual entry not necessary to maintain this ejectment *ibid.*
 Of proceeding by a mortgage *ibid.*
 When he must give tenant notice, and when not *ibid.*
 If mortgagor be in possession, no notice before ejectment *ibid.*
 Mortgagor no power to let leases 574
 Mortgagee may proceed to recover, if he gives notice to tenant that he will not disturb him *ib.*
 If he has encouraged tenant to lay out money on the premises, he cannot maintain the ejectment 573
 A mortgagee has the legal interest; after notice given, he may dis-
 train 574
 Mortgagor may, *pending suit*, apply to pay principal, interest, and costs *ibid.*
 Court will order all proceedings to be staid on payment of principal, &c. *ibid.*
 On payment of the principal, &c. court will stay proceedings, and on bond for performance of covenants, and will discharge defendant out of custody *Page* 575
Posse for plaintiff 373
 How to recover the mesne profits 575
 In what name the action ought to be brought *ibid.*
 What proof is necessary to recover them *ibid.*
 If brought by nominal plaintiff, court will stay proceedings till security is given for costs 576
 One tenant in common may have this action against the other *ibid.*
 Cannot pay money into court *ib.*
 How to remove an ejectment from the mayor's court, *London* *ib.*
 Of consolidating declarations in ejectment *ibid.*
Elegit.
Elegit is a judicial writ 393
 If goods are not sufficient, then a moiety of the lands, &c. *ibid.*
 After *elegit* executed, cannot take the body *ibid.*
 A rent charge may be extended *ibid.*
 So a term of years *ibid.*
 So lands in ancient demesne *ibid.*
 But a rent seck, or copyhold, cannot *ibid.*
 If *elegit* be levied on the goods only, and no lands extended, then a *ca. sa.* may be had *ibid.*
 May award *elegits* on the roll 396
 Proof necessary to support *elegit* *ibid.*
 Sheriff need not return an inquisition, if no lands extended *ibid.*
 Not bound to deliver a moiety of each particular *ibid.*
 The moiety to be in value *ibid.*
 What the sheriff is to do on an *elegit* *ibid.*
Elegit in debt and case 394
 Proof

I N D E X.

Proof to support ejectment on an *elegit* Page 396

May award *elegits* on the roll *ib.*

Error.

What a writ of error is 662

Error lies from inferior courts in this court *ibid.*

From this court, if proceedings are by bill, into the *Exchequer* chamber *ibid.*

So in a *qui tam* action 663

If proceedings by original, error lies in the House of Lords *ibid.*

From proceedings on the law side of *Exch.* to *Exch.* Chamb. *ibid.*

Where on judgment of *scire facias* *ibid.*

Who may have it, and who not *ibid.*

What to describe in the writ 664

Against whom to be sued *ibid.*

When it may be tested *ibid.*

It will not lie on a nonsuit *ibid.*

Of motion to quash the writ, and in what cases *ibid.*

If it be sued out against good faith, it will be quashed 665

Judgment shall not be reversed upon error, for any variance in form between original and declaration, nor between original and bill *ibid.*

Death of either party between verdict and judgment, not to be alledged for error *ibid.*

The stat. of jeofails extends to judgments on confession, &c. so as there be an original writ, or bill, and warrants of attorney filed *ibid.*

After verdict, no judgment to be stayed for any defect in form or substance, in any bill, &c. for variance, &c. 666

Within what time to be brought *ibid.*

If party confesses that the writ is brought purely for delay, court

will interfere, therefore will not stay proceedings, on an action pending such writ Page 666

When attorney offered to waive the judgment if he would point out the error: rule also to stay proceedings on the judgment pending error *ibid.*

If parties are in such cases restrained from bringing error, legislature must interfere *ibid.*

In what cases bail is to be given in error, or execution may issue *ibid.*

Bail in error cannot render 667

No execution to be stayed on any action of debt on 2 *Ed.* 6. unless bail *ibid.*

Nor on any action on the case, trover, covenant, &c. *ibid.*

Not to extend to popular actions *ibid.*

No execution shall be staid after verdict in any personal action whatsoever, unless bail *ibid.*

Not to extend to executors, nor actions penal *ibid.*

In dower and ejectment, bail to be given by plaintiff himself *ibid.*

The recognizance to be in the value of two years rent due, and costs *ibid.*

In ejectment defendant may give two sureties *ibid.*

Executors, when judgment is *de bonis propriis*, must put in bail 668

But if *de bonis testatoris*, otherwise *ibid.*

In error on judgment in debt on bond, bail bound in the sum recovered sufficient, it being double the sum due *ibid.*

Bonds that require bail *ibid.*

Bonds that require no bail *ibid.*

Bail shall be given in debt upon the judgment, if no bail given before, though a writ of error is brought, otherwise not 669

Bail

I N D E X.

Bail not requisite on error on judgment, in an action founded on a prior judgment, nor in debt on recognizance of error

Page 669

How to sue out a writ of error on judg. in *K. B.* returnable in *Exch.* ibid.

Pracipe ibid.

How to get it allowed ibid.

Allowance served is a *superfedeas* to all proceedings ibid.

When error shall be delivered to the clerk of the errors 670

Within what time bail is to be put in ibid.

When a *superfedeas* ibid.

Error allowed 31st *May*, final judgment not signed till the 14th *June*, within four days of which bail was put in—rule to set aside the execution made absolute ibid.

A *superfedeas* on being allowed, and bail being given, if bail is required 671

It is a *superfedeas* if allowed, though before judgment signed ibid.

But if execution is executed before allowance or notice, no re-stitution ibid.

It is no contempt to take out execution until after notice of bail given ibid.

How to put in bail ibid.

Notice of bail 672

Cannot be taken before a com-missioner ibid.

Rule for better bail ibid.

Within what time ibid.

Within what time to justify ibid.

Within what time, if served in vacation ibid.

What notice requisite ibid.

When to take out a rule to transcribe 673

How to proceed after service ibid.

The *K. B.* only send a transcript of amendment ibid.

Of examination of transcript Page 673

Of the action on the judgment, pending error, when there shall be a stay of proceeding in the action, and when not 674

After transcript is examined, it is to be delivered to the clerk of the errors in the Exchequer chamber ibid.

When to take out rule to alledge diminution 675

Of alledging diminution ibid.

Rule to assign errors ibid.

Who are to join in such assignment 676

Of the writ of *certiorari* ibid.

Of what term original to be be-spoke ibid.

Setting down cause for argument 677

The like if real errors ibid.

When copies of books to be de-livered ibid.

If cause heard, how to proceed ib.

The days for hearing causes 678

Common assignment of errors ib.

Certiorari to certify bill, &c. 679

As to allowance of interest against bail in error 680

Error from the Common Pleas into the King's Bench Vide my Instr. Clericalis in C. B. 705.

Original when to be bespoke 682

Error may be amended ibid.

Trespas against two, verdict against one, error brought by the two, amended ibid.

How to proceed when transcript is carried over ibid.

When *sci. fa.* to be made return-able 683

How to get *sci. fa.* returned ibid.

On return day rule for judgment ibid.

Rule on *sci. fa.* and to assign errors, may both be entered on same day 684

How

I N D E X.

- How to proceed if no assignment *Page 684*
 How if there is *685*
 If for want of original how to proceed *ibid.*
Certiorari to be sued out by the plaintiff *ibid.*
 If not returned how to proceed *ibid.*
 If errors are special how to proceed *ibid.*
 After joinder how *686*
 Of the entries on the roll *ibid.*
 If plaintiff's attorney neglects to deliver books, how to proceed *ibid.*
 Of interest *687*
 If general errors assigned, how to set them down *ibid.*
Scire facias quare, &c. *ibid.*
Præcipe for ditto *688*
 After error allowed, and defendant in error becomes bankrupt, the assignees are to proceed in his name *ibid.*
 Assignment of errors, that there is no original writ filed of record *689*
 For the want of warrants of attorney filed assigned *690*
Certiorari to certify warrants of attorney *ibid.*
Præcipe *ibid.*
 No *certiorari* to be sued out without motion after *certiorari* already returned *691*
Certiorari to certify an original *ibid.*
Præcipe *ibid.*
 Assignment of general errors *ibid.*
 Error in fact and law may be assigned *692*
 But if both, may demur *ibid.*
 How to proceed if error in fact assigned *ibid.*
Joinder in nullo est erratum *ibid.*
 The like where the want of an original is assigned *693*
 The like where the want of a warrant of attorney is assigned *Page 694*
 Entry of affirmance of the judgment in *K. B.* *ibid.*
 Judgment of reversal *ibid.*
 The entry of a *non pros* after *scire facias quare executionem non in error, for want of assigning errors* *ibid.*
 A *fi. fa.* on a judgment affirmed in the *Exchequer Chamber* from the *King's Bench* *697*
 A *ca. fa.* for ditto *ibid.*
 If on a *non pros* for not assigning errors *698*
Fi. fa. for not assigning errors from *C. P. to K. B.* *699*
Ca. fa. for not assigning errors from *C. P. to K. B.* *ibid.*
Fi. fa. upon affirmance in debt in the *K. B.* from *C. P.* *700*
Ca. fa. upon ditto *ibid.*
 Writ of restitution *ibid.*
 Notes thereon *ibid.*
Error quod coram vobis residet.
 When it lies *703*
 If an infant appears by attorney, he may have this writ *ibid.*
 Rule for allowance *ibid.*
 Infant to have guardian appointed *ibid.*
 Rule to assign errors *ibid.*
 When this writ may be sued after a former one is abated *704*
 Lies not after affirmance in *Exchequer* *ibid.*
Error in Parliament.
 When made returnable *704*
 How to sue out error in parliament and get it allowed *ibid.*
 If bail is required, how and when to put it in *ibid.*
 When there is a contempt pending error, court will oblige the plaintiff to enter into a rule not to commit waste *705*
 No

I N D E X.

No *sci. fa.* issues to assign errors

Page 704

If plaintiff alledges diminution, a *certiorari* issues in 10 days *ibid.*

Argument upon real errors *ibid.*

A short day may be appointed if the house is going to rise *ibid.*

If there is an argument, cases are to be drawn up, and signed by counsel 706

If error be brought after an affirmation in *K. B.* in parliament, new bail given 707

The standing orders respecting writs of error *ibid.*

After error brought, plaintiff speedily to prosecute same, and satisfy the officers the fees of the house *ibid.*

The errors to be assigned in eight days, or *non pros* *ibid.*

If diminution be alledged, and *certiorari* prayed, it is to go without motion, and be returned in ten days, or plaintiff to lose the benefit of his writ *ibid.*

No cases to be delivered unless signed by counsel 708

No putting off day for hearing without notice two days before, and oath made thereof *ibid.*

Certificate to be given of *certiorari* being awarded, concerning writs of error *ibid.*

How counsel are to proceed on argument *ibid.*

Does not determine by prorogation *ibid.*

Assignment of errors *ibid.*

A *test. fi. fa.* in case, on a judgment affirmed 709

Abatement of Error.

In what cases the writ shall abate, when not 710

Of discontinuance of error *ibid.*

Abatement by death of *C. J.* *ibid.*

— by marriage 711

If errors assigned before defend.

death, how to proceed. P. 711

Court of error can award a *venire facias de novo* *ibid.*

If judgment on demurrer be reversed, *B. R.* to award inquiry *ibid.*

Costs in Error 711.

Escape Warrant.

Upon an escape warrant, plaintiff is to declare within two terms 584

Essoign.

The first return of every term is properly the first day of every term, and thereon the court sits to take essoigns 79

A corporation cannot cast an essoign 493

Not encouraged 487

No essoign in a personal action *ib.*

Excise.

Officers not to be sued for any offence committed in execution of their office until after a month's notice 657

Particulars of notice 658

Officers may tender amends *ibid.*

If sufficient, verdict for defendant *ibid.*

No evidence of the cause of action to be produced (except what is contained in the notice) *ibid.*

Defendant may pay money into court *ibid.*

Limitation of actions *ibid.*

Plea general issue 659

Vide Customs 659.

Executions.

An execution, what 377

Three sorts *ibid.*

How to be engrossed *ibid.*

How to indorse the levy in debt *ibid.*

How

I N D E X.

How in case	Page 377	How to be sued out	Page 383
There cannot be two executions at same time	378	As to <i>teste</i>	ibid.
A <i>fi. fa.</i> may be had first, and for the residue a <i>ca. fa.</i>	ibid.	A <i>fi. fa.</i> must be sued out, to ground a <i>testatum</i>	ibid.
An <i>elegit</i> may be had after a <i>fi. fa.</i>	ibid.	The goods bound from delivery of writ	383
But if the body is taken, no <i>fi. fa.</i> or <i>elegit</i> can be had	ibid.	How to sue out a second, if the first levies only a part	ibid.
Execution to be sued out within year and day	ibid.	A fraudulent <i>fi. fa.</i> executed, a <i>fi. fa.</i> at the suit of another to be preferred	384
If not, there must be a <i>sci. fa.</i>	ibid.	When set aside on bankrupt's certificate	ibid.
When no <i>sci. fa.</i> requisite	ibid.	The first to have priority	ibid.
When a contempt, to take it out	ibid.	If 2d execution pays off first, court will not compel sheriff to refund	ibid.
If <i>fi. fa.</i> is sued first, and part levied, you may sue a <i>ca. fa.</i> for residue; or a 2d <i>fi. fa.</i> or <i>elegit</i> ; but if taken on a <i>ca. fa.</i> then no <i>fi. fa.</i> or <i>elegit</i> can be issued	ibid.	Sheriff who began the execution, shall end it	ibid.
A <i>ca. fa.</i> may be had after <i>elegit</i> executed only on goods	ibid.	When necessary to have a <i>venditioni exponas</i>	ibid.
<i>Ca. fa.</i> in debt	379	<i>Fi. fa.</i> against one partner, sheriff may take the goods of both, and the vendee shall have a moiety in common	ibid.
— in case	ibid.	If a man die in execution, may have a <i>fi. fa.</i> or <i>elegit</i>	385
— in covenant	380	Execution does not abate by plaintiff's death, but sheriff may sell	ibid.
— ejectment	ibid.	When landlord intitled	ibid.
— trespass and assault	ibid.	If after verdict, and before day in bank, plaintiff dies, a <i>sci. fa.</i> before execution	ibid.
— replevin	ibid.	So if defendant dies	ibid.
— trespass	ibid.	When <i>fi. fa.</i> , <i>ca. fa.</i> , or <i>elegit</i> , may be sued without <i>sci. fa.</i>	ibid.
— for words	ibid.	<i>Fi. fa.</i> in case	ibid.
For the defendant	ibid.	The like in debt	ibid.
On a nonsuit	ibid.	After a <i>sci. fa.</i>	386
<i>Ca. fa.</i> in a penal action	381	The like in assault	ibid.
For an administrator in case	ibid.	— covenant	387
After a <i>sci. fa.</i>	ibid.	— ejectment	ibid.
If by original	382	<i>Testatum fi. fa.</i> in case	ibid.
How to sue out a <i>testatum</i> (it is now absolutely requisite)	ibid.	— debt	ibid.
<i>Test ca. fa.</i>	ibid.	If by original	388
This writ does not lie against peers or their wives (<i>except in certain cases</i>)	ibid.	<i>Non omittas fi. fa.</i>	ibid.
<i>Fieri facias</i> , the nature of this writ, and against whom it lies	ibid.	<i>Fi. fa.</i> for the residue, in debt	ibid.
If part levied, may have a <i>ca. fa.</i> for the residue, it must recite the <i>fi. fa.</i> and return	383	<i>Test. fi. fa.</i> into <i>Durham</i> in case	ib.
		<i>Fi.</i>	

I N D E X.

Fi. fa. de bonis ecclesiasticis P. 389
Fi. fa. against an administratrix,
 where she confesses the debt of
 the testator in case 390
Fi. fa. against an administratrix in
 debt *ibid.*
 The like against an executor 391
Fi. fa. for defendant's costs in case
 392
Fi. fa. for costs on a nonsuit *ibid.*

Executors.

When they bring actions all must
 join 28
 But if brought against them it must
 be against such as do administer
ibid.
 If one be an infant *ibid.*
 If both of full age, must be
 brought by both, though one
 do not prove *ibid.*
 Executors when plaintiffs pay no
 costs on verdict or nonsuit 367
 If they confess judgment, liable
 to costs *de bonis propriis* *ibid.*
 So if they plead a false plea *ibid.*
 If judgment be taken by default,
 he admits assents 368
 Executors defendants pay costs in
 all cases *ibid.*
 And if judgment for him, to have
 costs *ibid.*
 On inquiry, he cannot give in evi-
 dence the want of assents *ibid.*
 On judgment upon demurrer, she-
 riff not to return a *devastavit*
ibid.
 After two *nibils*, court will relieve
 an executor on motion, if it
 comes within a reasonable time,
 but not otherwise *ibid.*
 On a false plea, how judgment is
 369
 Liable to costs, if he bring error on
 a judgment after a *devastavit* *ib.*
 Liable on a *non pros* for not de-
 claring *ibid.*
 Liable to costs for not going to
 trial *ibid.*

If executor does not proceed to
 trial according to notice, liable
 to costs if he does not shew good
 reason to the contrary, as a dis-
 covery of the estate being con-
 veyed. Page 369

After motion for judgment as in
 the case of a nonsuit, the ad-
 ministrator had leave to discon-
 tinue, though he undertook per-
 emptorily to try *ibid.*

Rules as to payment of debts 370
 When he may retain *ibid.*

Old method of obtaining judgment
de bonis propriis *ibid.*

The best way to sue 371

Judgment against an administrator
 in debt 425

The like by confession in case 426

Judgment of assents *in futuro* upon
 a plea of *plene administravit* in
 case 427

No costs allowed on a judgment of
 assents *in futuro* 428

How to sign such a judgment *ibid.*

Judgment of assents *in futuro* in
 debt *ibid.*

Executor cannot be sued in a court
 of conscience 639

Evidence.

What is called evidence 342

How to prove a bond *ibid.*

There are two kinds of evidence
ibid.

Rule is, best evidence to be given
ibid.

Discourse no evidence 343

Hearsay, as to custom, is *ibid.*

When it is admitted *ibid.*

Books of account *ibid.*

Who are good witnesses *ibid.*

What persons interested may give
 evidence 344

Records *ibid.*

Verdict *ibid.*

Writ *ibid.*

Bargain and sale *ibid.*

Recoveries 345
 Bill

I N D E X.

Bill in Chancery, and answer Page 345
Decree ibid.
Affidavits ibid.
Postea ibid.
Probate ibid.
Rolls of court baron ibid.
Registers of christenings, &c. ibid.
Admission ibid.
General character 346
In every issue, affirmative to be proved ibid.
No evidence necessary, but what is agreed by the pleadings ibid.
When on the general issue ibid.
If substance of the issue be proved, sufficient ibid.
Modo et forma, when mere form, when not ibid.
Brief in ejectment ibid.
Proofs necessary to support deeds, deaths, &c. ibid.
How to prove a will ibid.
If plaintiff in by descent, what necessary to prove 347
Evidence on inquiry 404

Exigent. Vide Outlawry 511.

Feigned Issue.

THESE are generally granted by the court of Chancery or Exchequer, on the equity side, to try important facts 641
Declaration on feigned issue 642
Plea and issue 644
The court of Chancery, also, upon points of law, send a case 642
How to proceed to bring it on ib.
Costs ibid.

Fieri facias. Vide Execution 385.

Fines.

Fines payable to the king on original writs 498

General Issues.

WHAT purpose calculated for Page 270
Need not be signed by a counsel 271
General issue on non assumpsit ibid.
Non est factum to an action on bond ibid.
Nil debet ibid.
The like to qui tam action 271
Notes thereon 272
Non assumpsit by an executor ibid.
To an action in detinue for a lease ibid.
Not guilty in trespass ibid.
_____ in trespass and assault ibid.
_____ in case ibid.
Non assumpsit, and a set-off ibid.
The like of a judgment 274

Habeas Corpus.

OF the writ of *ha. corp. ad subjiciend.* 612
No *ha. corp.* lies for an enemy prisoner at war ibid.
The great delays originally made in granting the writ, and making return ibid.
This oppression gave birth to the famous *ha. corp.* act ibid.
How to proceed to remove the body from the custody of sheriff to the King's Bench 613
Formerly the writ could not be made returnable immediately, but now may, and an attachment for not obeying it ibid.
Of the *ha. corp. ad respondend.* ibid.
How to remove from the custody of the sheriff, on a Common Pleas writ, to the King's Bench prison 614
If in an inferior jurisdiction, on process from that court ibid.

Can-

I N D E X.

Cannot be had by plaintiff to remove his own cause to *K. B.*

Page 614

How to sue it out 615

Ha. corp. *ibid.*

Præcipe for ditto *ibid.*

Any judge may commit, though directed to the chief justice *ibid.*

How to proceed *ibid.*

Fees in the country *ibid.*

Prisoners committed, to remain for two days, notwithstanding any other writ of *ha. corp.* 616

Defendant in custody, not to be discharged till bail perfected *ibid.*

No suit to be removed from an inferior court, unless writ be delivered before issue or demurrer joined *ibid.*

A suit once remanded, shall never after be removed *ibid.*

No cause to be removed, if debt or damages laid in the declaration do not amount to or exceed 5*l.* *ibid.*

Not to be allowed after one of the jurors sworn 617

No cause under 10*l.* to be removed into a superior court, unless bail be given for the debt, &c. *ibid.*

If judgment be obtained in the inferior court, and the defendant cannot be found, how to proceed *ibid.*

Upon what condition execution shall be stayed upon any writ of error, &c. for reversing judgment given in an inferior court, where the damages are under 10*l.* 618

Ha. cor. to remove the cause *ibid.*

Præcipe for ditto *ibid.*

How to proceed before allowance by the judge below, and action be under 10*l.* 619

If above 10*l.* *ibid.*

How plaintiff is to proceed after allowance Page 619

How to proceed on the part of the defendant *ibid.*

No bail to be put in before the writ returned 620

Bail-piece *ibid.*

Recognizance of bail *ibid.*

Notice of bail to be given 621

When bail is to be put in, how to compel bail to justify *ibid.*

That every defendant not being executor, &c. upon a *ha. corp.* to remove inferior causes, put special bail *ibid.*

Exception by taking out rule, to be within 28 days 622

Notice of justification *ibid.*

When to be given *ibid.*

If more causes than one be returned, bail must be put in for the whole *ibid.*

In such case separate bail-pieces *ibid.*

Cannot sign a *non pros* *ibid.*

Of declaration, venue, and plea *ibid.*

Must declare within two terms 623

If the cause be removed out of the court of *Canterbury*, &c. where the venue is to be laid *ibid.*

When to plead *ibid.*

Procedendo *ibid.*

Directions to the inferior courts 624

Of the habeas corpus ad satisfaciendum 628

Ha. corp. ad satisf. in case *ibid.*

— — — debt *ibid.*

How to charge the prisoner in execution 629

Hab. corp. ad testificand. for a prisoner to give evidence 336

The use of this writ 627

As to obtaining it for sailors on board *ibid.*

The affidavit *ibid.*

Hun-

I N D E X.

Hundredors.

Proceedings against them upon the statute of hue and cry
Page 493
 No person to sue without notice to the constable, and publishing in the Gazette *ibid.*
 And before action, give security to the chief clerk or filacer for costs *ibid.*
 Before action brought, bond must be given to the chief clerk or filacer of the county for costs. 8 *Geo. 2. c. 16.* *ibid.*
 If given to sheriff he is to certify same to chief clerk, &c. and certificate delivered by the party robbed to the chief clerk before process issue 494
 How to proceed *ibid.*
 High constable to be served with process, who is to give public notice the next market day, &c. and enter appearance *ibid.*
 If he does not appear a *distringas* is to issue *ibid.*
 How to appear 495
 The form of declaration *ibid.*
 Plea *ibid.*
 Declaration need not recite original at large, but only the nature of the action *ibid.*
 As to *ven. fac.* *ibid.*
 If judgment be given against the hundred, the sheriff to shew the writ of execution to two justices, who are to tax and levy the charges *ibid.*
 The money to be paid within ten days after collection 496
 How constable to be reimbursed *ibid.*
 As to demolishing houses, hundred liable *ibid.*

Impar lance.

THE meaning of the word *Page 236*
 No special imparl. without leave 237
 If the writ be returnable the last return of the term, defendant intituled to an impar lance *ibid.*
 If of any other return, and plaintiff does not declare *four days before the end of the term*, he is entitled to an impar lance *ibid.*
 If a writ be returnable in one term, and the declaration is not delivered before the *essoign* day of the second term, defendant is intituled to an impar lance 238
 Refused on a *habeas corpus* *ibid.*

Infants.

An infant by the common law 522
 Ditto by the civil law *ibid.*
 In what cases he is liable, and in what cases not *ibid.*
 If warrant of attorney be given by an infant, and another, court will order the name of the infant to be struck out 523
 To prosecute by his next friend, and defend by guardian *ibid.*
 Infant defendant must defend by guardian 524
 How if joined with others *ibid.*
 If an infant appears by attorney, it is error *ibid.*
 If an attorney undertakes to appear for an infant, he must do it by guardian, and how to compel him *ibid.*
 Before declaration a guardian must be appointed *ibid.*
 Petition to assign a guardian to prosecute *ibid.*
 Affidavit 525
 How to proceed thereon *ibid.*
 One

I N D E X.

One admission will do to prosecute and defend all actions	Page 525	Same notice on a <i>sci. fieri</i> inquiry	Page 401
The form of declaration	ibid.	Notice to the attorney, if he appears; if not, to the defendant	ibid.
Issue	ibid.	If set aside for irregularity a new writ must issue	ibid.
Venire and distringas	ibid.	If jury mistake in point of law, or give too small damages, court will order a new writ	ibid.
Infants defending	526	Inquiry executed on return day, good	ibid.
If he appear and plead by attorney, plaintiff may have it struck out	ibid.	If plaintiff become bankrupt, may proceed to final judgment	ibid.
Petition to assign a guardian to defend	ibid.	In <i>London</i> and <i>Midd.</i> to be left one day before executed	ibid.
Plea of infancy <i>per guardian</i>	527	If no proceedings for four terms	ibid.
If infant appears and pleads by attorney, and plaintiff finds it out, how to proceed	ibid.	Where plaintiff concludes to the country on defendant's plea, and gives notice of trial on the book, the same notice shall serve for inquiry after judgment upon demurrer, but then notice ought to be given of the day, hour, and place	ibid.
Infant plaintiff not liable to costs, but <i>prochein amy</i> is	ibid.	Notice of inquiry for <i>London</i>	402
But infant defendant is, although he names a guardian	ibid.	<i>Middlesex</i>	ibid.
On a rejoinder that he did not promise after 21, what proof necessary for plaintiff	528	country	ibid.
<i>Inquiry:</i>		What the notice is to express	ibid.
Of the writ	399	Of notice of countermand	ibid.
If judgment by default, and the certainty of the demand appears on record, court may assess the damages	ibid.	May be continued	403
But if not, then it must issue	400	Notice of countermand	ibid.
Where it need not issue	ibid.	Notice of continuance	ibid.
Want of it is aided	ibid.	Two days necessary	ibid.
The defendant may have this writ	ibid.	Costs may be recovered for not executing inquiry, same as for not going to trial	ibid.
Eight days sufficient in all cases, except where defendant lives 40 miles from <i>London</i> , when the venue is laid in <i>London</i> or <i>Middlesex</i> , then 14 days	ibid.	Writ of inquiry	ibid.
The like notice on a judgment on demurrer	ibid.	How to be engrossed	404
No proceedings for four terms, then a term's notice: but if slaid by injunction, a term's notice not requisite	ibid.	Sheriff's fees	ibid.
<i>Sunday</i> to be accounted one of the days, if not the day notice is given	401	Of proof required, and as to interest	ibid.
		Rule for judgment	ibid.
		<i>Sunday</i> not to be reckoned	ibid.
		Four full court days	ibid.
		How to proceed on it to final judgment	ibid.
		<i>Sub.</i>	

I N D E X.

Subpoena on inquiry Page 405
Præcipe ibid.
 If either party attend by counsel
 notice to be given ibid.
 Of confessing the action 406
Cognovit in debt and case ibid.
 How to sign the judgment ibid.
 Inquiry before the chief justice,
 how to apply for it 407
 This writ is common ibid.
 May be obtained in vacation ibid.
 Mr. J. Buller granted it 408
 If executed before C. J. he may
 adjourn it ibid.
 If for want of a witness, plaintiff
 must pay costs ibid.

Insolvent Debtors.

Debtor charged in execution in
 any gaol, for a sum not exceed-
 ing 100*l.* may exhibit a peti-
 tion to the court, and give four-
 teen days previous notice to be
 discharged 604
 Affidavit to be delivered with pe-
 tition of service of notice ibid.
 Creditor wanting further time 605
 Prisoner on an attachment, &c.
 and on *excomm. capiendo* ibid.
 If by neglect, prisoners do not
 petition, and if it is by igno-
 rance or through mistake ibid.
 Interrogatories may be filed by
 creditors 606
 A prisoner who has lost the benefit
 of 32 Geo. 2. may have benefit
 by 26 Geo. 3. ibid.
 The notice in town, or at the as-
 sises ibid.
 Schedule ibid.
 Petition 607
 Affidavit of service of notice 608
 ——— seeing the gaoler sign
 609
 How to proceed to get a discharge
 ibid.
 Plaintiff's attorney cannot sign
 the note for his client ibid.
 Objections to the schedule in point

of form, to be made the first
 time Page 609
 Groats must be made payable on
 every *Monday*, whatever may
 be the day the defendant is
 brought up. ibid.
 A judge's order for discharge is
 final 610
 The form of the note ibid.
 If plaintiff cannot attend how to
 proceed ibid.
 The note may be had at the clerk
 of the rules ibid.
 A prisoner had given two notices,
 the one he did not proceed un-
 der, and gave the other fourteen
 days inclusive, the court dis-
 charged him, as they thought,
 in favour of liberty, they might
 make one day inclusive, and no
 surprise on the plaintiff, as he
 had given previous notice the
 term before ibid.
 Although a prisoner escape in ex-
 ecution, and be retaken, yet
 he shall have benefit of the act
 611
 If debtor brings actions after dis-
 charge, shall hold money as a
 trustee only ibid.
 A general judgment by warrant of
 attorney, will not warrant a
 special execution ibid.

Interrogatories.

Examining witnesses on interro-
 gatories 337
 How to proceed in term ibid.
 In vacation 338
 When court will assist defendant
 ibid.
 When depositions may be read ib.
 Court may put off trial from time
 to time until consent ibid.
 Where to take the witness to be
 examined ibid.
 The form of interrogatories for
 plaintiff 339
 The like for the defendant ibid.

Joint

I N D E X.

Joint Tenants 28.

Issue.

In what cases attorney may make up the issue himself 301
 How to make up issue, if declaration and plea be of the same term 302
 The like where they are of different terms *ibid.*
 How where there are two or more issues 303
 How to make up issue against two defendants, where one pleads, and the other lets judgment go by default 304
 The notice of trial *ibid.*
 How to make up issue in a county palatine 305
 The like if it is a *Welsh* issue, to be tried in the next *English* county *ibid.*
 How to award *venire*, if sheriff be a party to the suit 306
 How to be ingrossed and delivered *ibid.*
 How to compel plaintiff to enter the issue *ibid.*
 Rule cannot be given same term it is joined *ibid.*
 If plaintiff wants time, how to apply *ibid.*
 Must enter the issue within the time mentioned in the rule 307
 Issue to be entered before record sealed *ibid.*

Judges and Officers of the Court.

Formerly the king used to sit in person 49
 Power delegated to judges, and their power 50
 Of the highest importance that the power of the judge and jury are kept distinct, that the judge determine the law, the jury the fact 51
 Formerly their commissions were *quamdiu bene se gesserint*, now

during their good behaviour

Page 51

Salaries *ibid.*
 They are sovereign justices of oyer and terminer, and gaol delivery, &c. *ibid.*
 The present judges *ibid.*
 The present chief justice, when created a peer and took his seat 52
 Judge of record may justify that he did the act in his judicial capacity *ibid.*
 Officers of the crown side *ibid.*
 On the plea side 53
 Circuit 74
 Attornies of the court 54

Judgment by Default.

Definition of 397
 Signed where damages are to be given *ibid.*
 How to sign it in case *ibid.*
 If in debt *ibid.*
 A regular interlocutory judgment may be set aside *ibid.*
 Also an irregular one and affidavit 398
 May be signed after 24 hours from time plea demanded *ibid.*
 When to be signed without demand of plea *ibid.*
 May sign this judgment if defendant pleads after the four days in abatement *ibid.*
 No demand of plea, after a judge's order to warrant signing judgment *ibid.*
 If declaration is not taken out of the office, may sign judgment *ibid.*
 Order for two days cannot sign till the third day in the afternoon, &c. *ibid.*
 A judgment recovered is not an issuable plea, and plaintiff may sign judgment after an order obtained to plead issuably *ibid.*
 A sham demurrer after a judge's order

I N D E X.

order not an issuable plea
Page 398
 After judgment by default on demurrer, on one count no occasion to enter a *nolle prosequi* as to the other three *ibid.*
 Entry of interlocutory judgment, award of inquiry and final judgment, where the declaration is of a former term 414
 The like where declaration of same term 416
 After interlocutory judgment, plaintiff becomes bankrupt; may proceed in his name and take out execution 401

Judgments final.
 Entry of final judgment after verdict in case 366
 Judgment by *nil dicit* in debt 418
 ——— *nihil dicit* in case 417
 ——— by *non sum informatus* 418
 ——— by *cogn. action.* in case 419
 Judgment on demurrer to rep. *ibid.*
 ——— as in case of nonsuit *ib.*
 The like for not producing the record 420
 On a retraxit in case 421
 ——— ejectment *ibid.*
 For want of a rejoinder in debt *ibid.*
 For not entering the issue 422
 Against defendant upon five issues, and on demurrer to the repl. on the sixth 423
 For defendant on demurrer to plea 424
 The like on *non ass.* for defendant 425
 Against an *admor.* in debt *ibid.*
 The like by confession in case 426
 Of assets *in futuro* upon a plea of *plene adm.* 427
 The like in debt 428
Nil dicit in ejectment 562

Judgment as in Case of a Non-suit *Page 317*

Jurata.
Jurata in London 328
 ——— *Middlesex* 329
 ——— *Affizes* *ibid.*

Jurisdiction of the Court.
 The jurisdiction of this court over inferior courts 5
 It is a court of appeal, into which may be removed by writ of error, all determinations of the court of *Common Pleas*, &c. *ibid.*
 Grants *ha. corp.* for relief of persons wrongfully imprisoned; *mandamusses* to inferior courts to oblige them to do their duty, prohibitions to keep them within their proper jurisdiction; and may punish magistrates, and others, for wilful or corrupt abuse of authority 7
 Cannot hold plea under 40s. *ib.*
 No costs if debt or damages amount to less than 40s. *ibid.*
 Though debt lies on a *non pros* for 33s. 6d. 8

Justices 653.

Proceedings against them and Constables.

If action be brought, may plead the general issue; and if a verdict, double costs. So if plaintiff be nonsuited, judge must certify, &c. 653
 If there be a special verdict and it appear, &c. need not certify 654
 No writ to be sued out against any justice for what he shall do in the execution of his office till notice given him *ibid.*
 May within one month tender amends *ibid.*
 If tender be sufficient, verdict to be entered for defendant *ibid.*
 Plaintiff

I N D E X.

Plaintiff not to recover without
proof of notice *Page* 655
If justice neglects to tender, he
may pay money into court *ibid.*
Evidence not to be given of any
cause but such as is contained
in notice *ibid.*
Action not to be brought against
any constable, &c. acting in
obedience to justice's warrant,
till demand made of the copy
of the warrant and refusal there-
of 655
Where the judge shall certify the
injury for which cause of action
brought was wilful, &c. double
costs 656
Action to be brought within six
months *ibid.*
The form of notice against justice
and constable *ibid.*
Notice to the constable to demand
a copy of the warrant 657

Latitat.

A Bailable *latitat* 125
Præcipe for the office 126
How to sue it out *ibid.*
Alias and *pluries capias* *ibid.*
Non omittas 127
If on a *qui tam* action *ibid.*
If forfeiture to the poor, &c. *ibid.*
A *latitat* to *Chester*, being a
county palatine 128
The like to *Durham* 129
Case respecting this writ 130
—— *LANCASTER* 129
To the cinque ports *ibid.*
A common *latitat* not bailable

131
How to sue it out 132

Limitation of Actions. Vide Actions

30
When it begins to run 32, 528
Entry of a bill of *Middlesex* to save
the statute of limitations, and

how to proceed *Page* 528
No necessity to sue out a new one 529

Local Actions.

Real actions to be laid in the
county where the lands lie 220
Personal actions not *ibid.*
When action is transitory, may be
brought in any county 221
When founded on two things in
different counties, how to be
laid *ibid.*
If an assault in *Minorca* may be
laid in *London* 222
Actions on penal statutes *ibid.*
Construction of the act *ibid.*
If actions are brought against a
justice, mayor, &c. *venue* must
be laid in proper county 223
Nuisance, and debt for rent against
the assignee of a term, is local
ibid.

Members of Parliament.

MAY be either proceeded
against by bill, or original 488
If by bill, how to proceed *ibid.*
The form of the bill *ibid.*
Summons thereon 489
Præcipe for ditto *ibid.*
Distingas *ibid.*
Alias *ibid.*
Præcipe *ibid.*
Testatum distingas 490
How to appear *ibid.*
When to plead *ibid.*
Præcipe for original *ibid.*

Memorial.

The act 365
Of a judgment *ibid.*
Affidavit *ibid.*
How to be engrossed, sworn, and
registered *ibid.*

Mesne Profits.

The nature of the action 575
Proof

I N D E X.

Proof thereof *Page* 575
 Jury are not confined to the mere
 rent in their damages 576
 If brought by the nominal plain-
 tiff, court will stay the proceed-
 ings, til security given *ibid.*
 Cannot pay money into court *ib.*
 Tenants in common may have this
 action *ibid.*

Mittimus.

To a county palatine 340
 No *venire* or *disfringas* *ibid.*

Money paid into Court.

When and for what reason this
 practice was introduced 256
 If a sum be acknowledged due,
 must be brought into court *ibid.*
 Payment of money into court, is an
 acknowledgment of the action,
 but it does not preclude defend-
 ant from taking any objection to
 the action beyond that sum *ibid.*
 It is a matter of course, to pay
 money in court before plea,
 and may now be done after by
 by a judge's order *ibid.*
 In all actions where sum is certain
 it may of course be paid into
 court *ibid.*
 If plaintiff will not accept it, he
 proceeds at his peril 257
 In what actions it may be paid in
 of course *ibid.*
 How if the action be in trover
ibid.
 When court is to be moved special-
 ly *ibid.*
 May now be paid in an action on
 bond *ibid.*
 Construction of 4 *Ann. c. 16.* 258
 Bond conditioned to pay by instal-
 ments may pay in the arrears *ib.*
 In what actions money cannot be
 paid into court *ibid.*
 But if paid in by mistake and the
 plaintiff accepts it, plaintiff must
 recover beyond that sum 259

Arrears of annuity may be brought
 in *Page* 259

Bond for a gross sum, and an
 agreement to pay by instalments
 if punctually paid, where two
 sums were paid and the third not,
 court will not allow him to
 bring into court that sum and
 costs *ibid.*

After issue joined, plaintiff may
 take the money out on paying
 the subsequent costs *ibid.*

Chief clerk's fees *ibid.*

If plaintiff take the money out
ibid.

Court gave leave to withdraw the
 general issue to bring money in,
 and replead it *ibid.*

Method of paying money into
 court 260

If plaintiff accepts, how to proceed
ibid.

How to procure the appointment
 to tax costs; formerly defendant
 did this *ibid.*

If money be paid in a week after
 the term, a judge's order must
 be obtained *ibid.*

If the costs be not paid, the plain-
 tiff must go on, and cannot move
 for an attachment on the rule
 261

A case in which defendant on the
 rule to pay money into court
 was not liable to pay costs
ibid.

An auctioneer paying money into
 court acknowledges the action
ibid.

The common rule *ibid.*

The construction of the rule 262

Plaintiffs at liberty to accept the
 sum in respect to nonpayment of
 freight, &c. and to proceed as to
 any other breaches *ibid.*

Where a juror is withdrawn, the
 plaintiff intitled to the money
 paid in, and costs to that time
ibid.

Money

I N D E X.

Money may be paid into court ats.
of an executor *Page 262*

If plaintiff proceeds for further
damages, and afterwards wishes
to accept the money out of
court and costs, he must pay the
subsequent costs *ibid.*

He is entitled to the costs up to
the time of the money being
paid in, and defendant to the
subsequent costs *263*

But plaintiff after verdict for the
defendant, too late to make this
application *ibid.*

Motion, Notices of, 660.

Mutual Debts.

At common law, could not set off
251

How may by stat. *ibid.*

Mutual debts may be set off by
pleading in bar, or given in
evidence on the general issue
in manner, &c. *ibid.*

If debt accrues by reason of a pe-
nalty in a bond, or other spe-
cialty, the debt intended to be
set off must be pleaded in bar
ibid.

What must be shewn in the plea
252

Real sum to be set out *ibid.*

Mutual debts between a bankrupt
and any other person, how to
be set off *ibid.*

Cannot set off in replevin *ibid.*

If debt is of an equal sum, the
action is barred, but if for a less
sum the defendant must pray to
have it set off *ibid.*

Defendant may move to pay mo-
ney into court and give notice of
set-off *253*

Set-off allowed to be pleaded with
general issue after the latter had
been delivered *ibid.*

Notice to contain certainty

Page 253

May have particular of set-off *ib.*

Defendant lent acceptance to
bankrupt on a bill, which did
not become due until after the
act, and was then outstanding in
the hands of third persons; yet
defendant having paid the
amount after commission issued,
and before action brought
by the assignees, is intitled to
set-off *ibid.*

Two causes tried at same sitting;
one plaintiff took a verdict for
his whole sum, and it was held
he might still make a set-off,
and after enter a *remittitur* in
the second action *ibid.*

In what actions there may be a set-
off *254*

In what actions it cannot be plead-
ed to, or notice given *ibid.*

May set off to an action ats. assignees
ibid.

The plea of set-off must state
plaintiff's being indebted at the
commencement of the suit and
not at the time of the plea
pleaded *ibid.*

Where partner or executor brings
an action in his own right for
money received after the death
of the other partner or testator,
the defendant may set off what-
ever was due from plaintiff *255*

A debt barred by the statute of
limitations cannot be set off
ibid.

May after plea of general issue
move to withdraw it, and plead
anew with a set-off *ibid.*

A broker, with commission *del cre-
dere*, cannot prove a loss under a
set-off *ibid.*

A judgment in *B. R.* may be set
off against one in *C. P.* *ibid.*

I N D E X.

Ne recipiatur.

IF plaintiff hindered from trying his cause by *ne recipiatur*, he may try it next sittings, upon notice Page 330
But if to be tried at sittings after term, none can be entered until proclamation ibid.

Nisi Prius. Vide Record. 327

Nolle Prosequi.

When two partners plead separately 328
When a *nolle prosequi* may be entered against one of several defendants ibid.
When no occasion to make the entry 398

Non omittas.

Non omittas bill of Middlesex 122
— capias 127

Nonpros.

If plaintiff does not declare within two terms, and defendant has filed common bail within the term the writ is returnable, he may sign *nonpros* 468
By general rule, plaintiff must declare within 12 months after return of writ; but by rule of court, if he does not declare *within two terms*, defendant may sign a *nonpros* ibid.
If matters be under accommodation, or any thing should prevent declaring *within two terms*, may have a rule for further time ibid.
Defendant must file bail *the term writ is returnable*, or he cannot sign a *nonpros* ibid.
Defendant has twelve months to sign by bill, if he appears in

time; if by original, before es-
soign day of third term P. 469
If the writ be joint and the appearance several, cannot sign several *nonprosses* ibid.
When a *nonpros* may be signed against one, in an action against two ibid.
If removed by *ha. corp.* cannot sign a *nonpros* ibid.
Nor can a prisoner 470
Nor pending an injunction ibid.
Court refused to set aside a regular *nonpros* on stat. of usury ibid.
Ca. fa. or fi. fa. may be had for costs ibid.
An attorney ordered to pay the costs ibid.
Nonpros may be set aside for irregularity ibid.
How to sign a *nonpros* by bill ibid.
The like on a *latitat* ibid.
The plaintiff may be *nonprossed* for not replying 472
Nonpros by original, when it may be signed 504
How it may be signed 505
A *nonpros* for not declaring by original ibid.

Nonsuit.

Judgment as in case of.

Formerly if plaintiff did not proceed to trial, defendant was obliged to carry the record down by *proviso*, but now may move for judgment as in the case of a nonsuit 317
When intitled to this judgment in a town cause 318
In a country cause ibid.
How to proceed 319
No notice for judgment, as in the case of a nonsuit, requisite ibid.
Affidavit ibid.
How ibid.

I N D E X.

How to move *Page 319*
 What excuse plaintiff must shew to
 prevent judgment *ibid.*
 When not intitled to judgment *320*
 If once the cause has been carried
 down, defendant must after-
 wards take it down by pro-
 viso *ibid.*
 If issue was joined early enough
 for the next assizes, yet plaintiff
 not bound to give notice *ibid.*
 If a cause be carried down and
 made a *remanet*, cannot have
 this judgment *ibid.*
 A rule discharged on affidavit
 which is false, court will not
 open the matter again *ibid.*
 Cannot be had in replevin. *ibid.*
 If rule is made absolute how to
 proceed *321*
 How to proceed after a peremp-
 tory rule, and plaintiff neglects
ibid.
 Affidavit *ibid.*

Notices of Motion, &c.

Not to appear to a writ *660*
 To set aside an interlocutory judg-
 ment *ibid.*
 The like of a judgment and in-
 quiry *ibid.*
 The like of judgment and execu-
 tion executed, and that the mo-
 ney may be restored *ibid.*
 To file common bail on the arrest
661
 To set aside all proceedings for ir-
 regularity *ibid.*
 To shew cause why it should not
 be referred to the master, to
 compute principal and interest
 upon bond, and why upon pay-
 ment of costs, the bond should
 not be delivered up to be can-
 celled *ibid.*
 To shew cause why the judgment
 should not be set aside, and that

the plaintiff answer the matters
 of the affidavit *Page 661*
 Why the bail bond and the pro-
 ceedings thereon should not be
 set aside with costs *ibid.*
 Why the writ should not be
 quashed, and that the plaintiff
 answer the matter of the affida-
 vit *ibid.*
 To the sheriff to retain money by
 him levied *662*

Officers of the Crown Side.

WHAT officers of the court
 belong to the crown side *52*

Officers of the Plea Side.

What officers belong to the plea
 side *53*

Officers on the Circuit.

Officers belonging to the circuit *76*

Original, Proceedings by.

No more costs allowed in process
 by original than a common writ,
 unless the debt recovered be *50l.*
496
 Writs by original to be signed by
 the filacer, before sealed *497*
 All writs by original ought to be
 signed before appearance by the
 filacer *ibid.*
 Debt must amount to *10l.* *ibid.*
Præcipe for an original in case *ib.*
Capias thereon *498*
 May be sued out in vacation, tho'
 debt accrued after the term end-
 ed, and tested of the last day
 of the preceding term *ibid.*
 Fines to the king *ibid.*
Præcipe for original in debt *499*
Capias thereon *ibid.*
Alias and *pluries* *ibid.*
Testatum *ibid.*
 How to enter appearance *500*
Præcipe *ibid.*
 When

I N D E X.

When to enter common appearance *Page* 500

How to put in special bail *ibid.*

When to put it in 501

Notice of bail *ibid.*

Exception *ibid.*

How to justify *ibid.*

May rule the sheriff 502

May deliver declaration *de bene esse* *ibid.*

Declaration in case *ibid.*

The like in debt *ibid.*

In what county to lay the *venue* to keep the bail *ibid.*

Must now plead without oyer of the original writ *ibid.*

If plea be special, must be filed 503

If it be the general issue *ibid.*

When attorney makes up the issue *ibid.*

How to make it up *ibid.*

How to make up record *ibid.*

Jurata *ibid.*

How to pass record *ibid.*

Judgment by default, how to be signed 504

Writ of inquiry *ibid.*

How to proceed to final judgment *ibid.*

Within what time to declare or *nonpros* *ibid.*

Nonpros for not declaring 505

How to amend declaration *ibid.*

Petition to amend the original 506

How to proceed on it *ibid.*

Outlawry.

IF defendant is out of the kingdom, or absconds, may be outlawed 507

Outlawry in civil actions *ibid.*

If debt be paid, may be reversed *ibid.*

Woman not outlawed but *waivata* *ibid.*

Where a *capias* does not lie, cannot proceed to an outlawry

Page 507

Nor on a judgment by bill *ibid.*

If defendant avoids arrests, he may be outlawed 508

On total absconding, no endeavour to arrest necessary *ibid.*

If defendant does not appear on the original, a *capias* issues *ibid.*

If not on *capias*, an *alias* issues *ibid.*

Then a pluries and exigent *ibid.*

This mode is used when proceedings be against two and only one be arrested *ibid.*

Caveat as to declaring and keeping the other defendant in court *ibid.*

As to intitling declaration after outlawry *ibid.*

If two arrested and one bail, then the original must be against both *ibid.*

How to proceed *ibid.*

When it is necessary to have an *allocatur* exigent 509

How to proceed upon the *capias utlagatum*, and how after 510

How to get the money if above 50*l.* *ibid.*

If 50*l.* only 511

The exigent *ibid.*

Proclamation 512

The forfeiture *ibid.*

What not a forfeiture 513

Special capias utlagatum *ibid.*

Petition to the lords 514

Certificate to be signed by the clerk in court 515

Affidavit of plaintiff's demand 516

When outlawry may be reversed by attorney's undertaking *ibid.*

When special bail required, bond to be given to the sheriff *ibid.*

If the *cap. utl.* recites the cause of action, there must be bail 517

Of

I N D E X.

Of the appearance of defendant
before the *quintus exactus* P. 517
How to appear *ibid.*
If bail required, how to put it in *ibid.*
If justified, *supersedeas* to issue *ibid.*
Return on the allowance of the *supersedeas* *ibid.*
How to obtain it *ibid.*
After bail put in, may move to
reverse the outlawry of course *ibid.*
If common appearance *ibid.*
How outlawry is to be avoided 518
If goods be taken after reversal,
defendant shall be restored *ib.*
Goods seized, and proceedings are
got into the *Exchequer*, no restitu-
tion; but I think the reporter
is wrong here, and must mean,
after the sheriff has paid over
the monies 519
Defendant cannot be taken on a
Sunday on the *capias utlagatum*
ibid.
If error be brought for want of pro-
clamation being made, the de-
fendant must put in bail, not
only to answer the plaintiff in
the former suit, but to a new
one to satisfy the debt *ibid.*
Bail for the condemnation *ibid.*
No bail in error of an outlawry,
till reversal, and then the court
take bail to appear to an origi-
nal, to be brought within two
terms 520
Special bail is required on rever-
sal of outlawry, although no af-
fidavit be made previous *ibid.*
Now held that bail must be for to
answer condemnation money *ibid.*
How to sue out a writ of error to
reverse the judgment *ibid.*
If a person procures another to be
clandestinely outlawed who ap-

pears in public, such person to
reverse at his own expence
Page 521
Plaintiff cannot be non-prossed
after reversal *ibid.*
Of declaring after outlawry re-
versed *ibid.*
As to venue *ibid.*
On reversal, plaintiff may com-
mence a new action within a
year *ibid.*
On a *supersedeas* to the exigent,
how to declare *ibid.*
How to proceed to outlawry after
judgment obtained 522

Oyer.

Oyer, definition of 243
The antient practice of demand-
ing *oyer* of original and the pre-
sent *ibid.*
If a deed be set forth in the decla-
ration, defendant may have
oyer *ibid.*
So if defendant makes a proffert,
plaintiff may pray *oyer* *ibid.*
If *oyer* be granted of an instrument
or received, and it is set forth,
although he was not intituled
thereto, yet he shall take the
whole as part of his adversary's
defence *ibid.*
The defendant has two days to
give *oyer* of the deed 244
If craved before rule to plead out,
it is in time *ibid.*
No right to have *oyer* of a record
ibid.
Oyer not to be dispensed with of a
deed, though lost *ibid.*
Anciently made in court *ibid.*
The demand *ibid.*
Defendant must pay for *oyer*, and
has as much time to plead after
it is delivered, as he had when
demanded 243

Counties Palatine.

Mittimus to be sent there only 340
Mittimus

I N D E X.

Mittimus to a co. pal.	Page 340
Lat. to Chester	128
— Durham	129
— Lancaster	ibid.
No arrest under 20 l.	88

Paper Books.

W HAT they are	288
Paper days	ibid.
In what cases to be made up by the clerk of the papers	ibid.
How to make up the paper-book, and when it may be done without giving a rule to rejoin	ibid.
What is to be paid to the clerk of the papers	289
Entries to be paid for by the defendant	ibid.
How to proceed on a plea of a judgment recovered, if defendant returns the book in the first instance	ibid.
If he return it, and strikes out the rejoinder and demurs, how to proceed	290
Of setting down demurrer for argument	ibid.
Proceeding to final judgment thereon in case, and also in debt	291
Where the plaintiff tenders an issue on the defendant's plea, and notice of trial is given, if defendant demurs, and judgment is given, the notice shall serve for executing an inquiry, but plaintiff must give notice of the hour and place	ibid.
A general demurrer cannot be waived, but a special one may	292
Notice of trial given for the special issue, shall (if waived) serve for notice of the general issue	ibid.
When to return the book if made	

up and delivered in term, or 4 days after	Page 292
If a plea comes in late, how the book is made up	ibid.
When to return book if not made up within eight days after term, and delivered in London and Middlesex	ibid.
If at the assizes	ibid.
If plaintiff accept the book after the limited time, he cannot sign judgment	293
It must be returned on the fourth day in the evening	ibid.
Same point resolved	ibid.
If there be a waiver of the special plea, and general issue delivered, no entries are paid for ib.	
When to set down demurrer for argument	ibid.
If paper-book be of an issue in fact, or in law, to be returned in four days exclusive; and there is no distinction	ibid.
When plaintiff concludes <i>ad patriam</i> , and defendant demurs, he shall accept notice of inquiry	ibid.

Partners.

If defendant does not plead partnership in abatement, he cannot take advantage of it after, it being a waiver of the objection,	5 Burr 2611.
Partnership pleaded in abatement	270

Paupers.

What a pauper is	629
In early times poor persons were obliged to drop their claim; but now may have writs for no fee, counsel, and attorney	ibid.
May sue now, if not worth 5 l. in <i>forma pauperis</i>	630
How to proceed	ibid.
The form of the petition	ibid.
Affidavit	631
	19

I N D E X.

Is to pay no fees through all the cause, unless, &c. Page 631

No fee to be paid to his counsel or attorney; if he does, to be disappointed *ibid.*

Nor is he liable to costs for judgment as in the case of a nonsuit, nor to pay costs if he brings a new action, unless it appears he has been vexatious 632

After a nonsuit, and a new action brought, plaintiff, sued in *forma pauperis*, he must pay the costs of the former, before he can proceed *ibid.*

He can only sue in the cause he is admitted *ibid.*

He cannot be admitted to defend in *forma pauperis* *ibid.*

Peers, 96.

Proceedings against Peers.

The peers of England and Scotland are all privileged from arrests 96

Suits may be prosecuted against peers, &c. notwithstanding their privilege, provided no arrest 482

How to proceed by original 483

The act of 10 Geo. 3. extends to all writs of *distringas* 484

Præcipe for original in case 485

Distringas thereon *ibid.*

How to appear *ibid.*

If defendant appears after levy upon the *distringas*'s, he shall pay the costs before the money is returned *ibid.*

Declaration 486

When not entitled to an imparlance although an *essoign* be cast *ibid.*

Essoign lies not on a *capias* when there is an arrest 487

How to proceed by bill *ibid.*

Of the appearance 488

The form of a bill against a peer *ibid.*

Proceedings against Members

Page 488.

General Pleas 270.

Pleas in Bar and Special Pleas.

Within what time a plea in bar is to be pleaded 234

Copies of declarations to be paid for, whether delivered or filed before admission to plead 245

If defendant pleads specially to be filed *ibid.*

May plead as many pleas as he pleases by leave of court *ibid.*

Clerk of papers to receive no special pleas or demurrers before signed *ibid.*

No attorney to deliver any plea, that ought to be filed *ibid.*

How to plead double *ibid.*

May have a summons for time 246

What is an issuable plea *ibid.*

How to search for plea 239

How to proceed if four terms are elapsed 238

Plea of *non assumpsit*, and the statute of limitations 275

Replication and issue *ibid.*

Plea of set-off for money lent, &c. 276

Replication *ibid.*

Plea of satisfaction in *assumpsit* 277

Replication *ibid.*

Plea of *non assumpsit*, and a tender to the residue 278

Replication denying the tender 279

Replication if plaintiff accepts the money, and goes for further damages *ibid.*

Plea of infancy *ibid.*

Judgment recovered in *C. P.* in *assumpsit* 280

The like in debt *ibid.*

Plea of *non assumpsit* and *plene administravit* 281

Plene administravit, and a judgment outtanding 282

Plea

I N D E X.

Plea of bankruptcy in defendant
Page 283
 Plea of *nul tiel* record to an action
 on the judgment 284
 Replication *ibid.*
 If a judgment of the same court be
 pleaded, the term and number-
 roll to be given *ibid.*
 How to proceed to move to abide
 by the plea 285
 When court will order defendant
 to plead *instanter*, *ibid.*
 May have an order in vacation *ib.*

Of striking out the Plea 286.

May strike out the special plea and
 plead the general issue *ibid.*
 Or demur specially *ibid.*
 But cannot waive general issue, or
 general demurrer *ibid.*

Popular Actions 10.

How to compound them 645

Possession. Writ of. 566.

Postea.

How to proceed on it 347
 Rule for judgment *ibid.*
 Rule to be entered on the day in
 bank 348
 If by original, when *ibid.*
 No judgment to be entered, until
 the expiration of four days ex-
 clusive of the entry of a rule for
 judgment *ibid.*
 If either party die, no execution
 till *sci. fa.* *ibid.*
 For plaintiff on *non assumpsit* 371
 The like with a *tales* 372
 For plaintiff on *non est factum* 373
 ————— *Nil debet* *ibid.*
 ————— *In trespass* *ibid.*
 For plaintiff on a plea of *plene ad-*
ministravit *ibid.*
 ————— *In ejectment* *ibid.*
 On *non assumpsit infra sex annos* 374
 On not guilty in *trespass* *ibid.*
 For defendant, on a plea of *plene*

administravit

Page 374

For plaintiff on *non assumpsit* by an
 executor *ibid.*
 For plaintiff on a plea of *solvit ad*
diem *ibid.*
 For defendant on *non assumpsit* *ib.*
 For plaintiff in assault, on not
 guilty, and *son assault demeſne*
ibid.
 For defendant on a nonsuit 375
 Entry of the judgment after ver-
 dict on the roll in case 366
 If the cause is tried in town, plain-
 tiff's attorney indorses the *postea*
347
 The court fees *ibid.*
 If tried in the country, associate
 indorses it *ibid.*
 Rule for judgment not to be en-
 tered before day in bank 348
Postea in debt upon five issues, there
 being a demurrer to the repli-
 cation to the sixth plea 375

Prisoners, Proceedings against.

How the proceedings against them
 were formerly 582
 The present mode of delivering
 declaration against a prisoner in
 the custody of a gaoler 583
 To be alledged in declaration, in
 whose custody defendant is *ib.*
 Also at whose suit detained, or de-
 murrable *ibid.*
 The plaintiff is to cause a decla-
 ration to be delivered, before
 the end of *next term*, after re-
 turn of *process* he is charged
 with, and (unless in custody of
 marshal) cause affidavit there-
 of to be filed, before the first
 day of the *next term* after de-
 livery of such declaration, or
 to be discharged by *superſedeas*
ibid.
 In case of commitment or surren-
 der to marshal, after return of
process, and before declaration,
 plaintiff to declare before the
 end

I N D E X.

- end of the term next after such surrender, &c. *Page* 584
- Where taken by any sheriff on *mesne* process, and removed by *ba. corp.* and committed, proceeding against him shall commence, and be computed from the prisoner's being first taken, or charged in custody by virtue of such process *ibid.*
- No treaty to prevent *superfedeas*, unless in writing signed by defendant *ibid.*
- To declare on escape-warrant, before the end of the second term *ibid.*
- How to proceed in custody of Sheriff* 585
- Not to deliver declaration before process is returnable *ibid.*
- An amendment made *ibid.*
- The form of a declaration against a prisoner in custody of sheriff by bill *ibid.*
- How to be ingrossed, delivered, filed, and giving rule to appear and plead thereon *ibid.*
- The affidavit of delivery 586
- The plaintiff need not demand a plea before he signs judgment in custody of the sheriff *ibid.*
- Rule to plead may be given after the first rule out *ibid.*
- Within what time to plead 593
- Must proceed to final judgment within *three terms next after declaration delivered*, including the term judgment is signed 586
- Must be charged in execution *within two terms* *ibid.*
- How to charge defendant in execution in a county gaol *ibid.*
- If the defendant is in custody in *Newgate, Ludgate*, or any other county gaol, how to proceed against him for a new plaintiff 587
- If *ca. sa* returnable on a *dies non*, prisoner may be discharged *ib.*
- New rule relating to the extent of the King's Bench prison *Page* 587
- Of the day rule 588
- How to proceed if defendant be in custody of the marshal *ibid.*
- When to plead *ibid.*
- To proceed to trial and judgment within three terms *ibid.*
- Charge in execution within two terms *ibid.*
- The form of declaration against a prisoner in custody of the marshal *ibid.*
- How to charge a prisoner in execution in custody of the marshal *ibid.*
- Committitur* piece 589
- Of the marshal's book, called the commitment-book *ibid.*
- The *committitur* must be actually entered on record before the end of the second term *ibid.*
- A prisoner in custody *ats.* of the king cannot be charged with civil process unless by order of court, or by order of a judge *ib.*
- But if in custody on attachment for non-payment of costs, and charged with a civil action also, he may be charged with such attachment without an order 590
- Plaintiff must give notice of his having abandoned a former *committitur*, which is erroneous, before he enters a second *ibid.*
- The acknowledgment must be of the same term defendant is charged *ibid.*
- Of charging a prisoner in custody of the marshal, by way of a new detainer* *ibid.*
- How to proceed 591
- Service of a *latitat* at eight in the evening of return day, is good, though declaration be left in the office in the course of same day *ibid.*
- A prisoner,

I N D E X.

- A prisoner, on a point of irregularity, must apply as other defendants, or he loses the benefit
Page 591
- How to charge a prisoner in custody for a debt, if he is already in for felony *ibid.*
- If a prisoner in the Fleet be charged with declaration, and remove to *K. B.* plaintiff must proceed in *C. P.* to judgment, and then charge him in execution by *hab. corp. ad satisfaciend.* *592*
- Same in this court *ibid.*
- If a defendant, in custody on *C. P.* process, be committed to the *K. B.* before declaration, how to proceed *ibid.*
- How to proceed *by original* in custody of the sheriff *ibid.*
- Declaration *ibid.*
- If in custody of the marshal *593*
- Within what time to plead in county gaols *ibid.*
- Rule to plead is not to be given before affidavit of the delivery of declaration is filed *594*
- Construction of the rule *ibid.*
- May before final judgment put in bail *ibid.*
- If a prisoner pleads in person, he does not pay for the issue, *aliter* by attorney *ibid.*
- Though a prisoner is *superfedeable*, and not actually *superfeded*, he may be charged with a declaration *595*
- Caveat* respecting county gaols *ibid.*
- When prisoners are intitled to their discharge *ibid.*
- Once *superfedeable* always *superfedeable*, extends only to the same process *ibid.*
- If he does not *superfede* he cannot after he is charged in execution *ibid.*
- Prisoners are intitled to their discharge for want of declaring within two terms next after the return of the process *Page 596*
- In case of commitment or render *ibid.*
- How to discharge him from a county gaol *ibid.*
- The like from the marshal *597*
- If by original *ibid.*
- A treaty in writing will prevent a discharge *584*
- If before judgment, though *superfeded*, liable to be taken in execution, *aliter* after *597*
- If plaintiff does not proceed to judgment within *three terms* after declaration (including the term in which that was delivered as one), or in case of surrender after declaration, or if he shall obtain judgment, and does not charge defendant in execution *two terms* after, including the term in which it was given as one, then defendant must be *superfeded*. *ibid.*
- If any writ of error or injunction, then within two terms after affirmation or injunction dissolved *598*
- In case of surrender after trial had, or final judgment, to be charged in execution in two terms next after surrender and notice (the term surrender made to be one) *ibid.*
- If error or injunction, then within two terms next after judgment or affirmation nonprossed or discontinuance (the term in which such affirmation, &c. is included) *ibid.*
- Explanation of the rule *599*
- If writ be against husband and wife, and wife in custody, she shall not file bail for her husband on *superfedeas* *ibid.*
- Once discharged cannot be taken again *ibid.*
- Not

I N D E X.

Nor if he takes a new security, if it becomes bad by the act of the plaintiff *Page 599*

How to discharge defendant for not proceeding to judgment or charging in execution in custody of the sheriff *ibid.*

As to where a writ of error brought *600*

Court permitted an alteration in the committitur-piece, although filed *ibid.*

How in custody of the marshal *ib.*

Affidavit of service of summons *601*

May get plaintiff's attorney to consent *ibid.*

Attorney should be present, on a prisoner's signing a *cognovit* *ib.*

A *ba. corp.* brought by plaintiff to remove prisoners from inferior courts to *K. B.* quashed *602*

Superfedeas for not declaring *ib.*

Præcipe *ibid.*

Ditto by original *603*

The like for not proceeding to trial and judgment *ibid.*

For not charging the defendant in execution *ibid.*

The like on putting in good bail *ibid.*

Privilege.

Who are privileged from arrests *96*

Procedendo.

Writ of *procedendo* *623*

Process.

Definition *116*

Must be in the name of the king, and must be under the teste of the chief justice, or senior judge, if no chief *ibid.*

Latitat and bill of *Middlesex* must be returnable on a day certain *117*

If sued in vacation, how tested *ib.*

Variance between the declaration and process when fatal, and when not *ibid.*

How to sue out a bill of *Middlesex* *Page 118*

Latitat considered as an original and a good commencement of the suit *ibid.*

Warrant to prosecute *ibid.*

None of the duties in the 25 *Geo.* 3. c. 80. are to be charged to clients, on payment of the sum so charged, and costs, see *sect. 20.*

If party arrested out of county of *Middlesex* on this precept, proceedings will be set aside *ibid.*

Bill of *Middlesex* cannot be served in *London* *ibid.*

If it be doubtful as to the county *119*

In all process the day and year, &c. is to be set down with the name of the attorney, *stat. 2 Geo. 2. c. 3.*

Bill of *Middlesex* bailable *ibid.*

Præcipe for ditto *ibid.*

Alias *120*

Pluries *ibid.*

Distinction between process bailable and not *ibid.*

The several *ac-etiams* in case, debt, &c. *ibid.*

Non omittas bill of *Middlesex* *122*

Bill of *Middlesex* not bailable *ib.*

Notice *ibid.*

Defendant must be served personally, and service on return day is good *ibid.*

If there are several defendants, all must be served *ibid.*

Notice on process need not express the year *ibid.*

Husband only to be served where wife a party *ibid.*

If a warrant to prosecute has been once filed, there needs no other for further process *123*

Cities and towns having a sheriff or sheriffs *124*

Directions to be observed in counties, &c. *ibid.*

Palatine and the cinque ports *125*

A bail-

I N D E X.

A bailable <i>latitat</i>	Page 125	Where two partners plead different pleas	Page 328
<i>Præcipe</i> for ditto	126	When a <i>nolle prosequi</i> may be entered against one	ibid.
How to get it signed, sealed, and for warrant	ibid.	How to make up record in common cases	ibid.
<i>Alias capias</i>	ibid.	<i>Placita</i>	ibid.
<i>Pluries</i>	127	<i>Jurata</i> in London	ibid.
If to answer the plaintiff and the king	ibid.	The like in <i>Middlesex</i>	329
If forfeiture be to the poor and informer	ibid.	The like at the assizes	ibid.
<i>Non omittas capias</i>	ibid.	To be entered in town two days before the sittings on which cause to be tried	ibid.
<i>Latitat</i> to <i>Chester</i>	128	No record to be received in <i>Middlesex</i> for sitting after term, unless entered two days after last day of term	ibid.
To <i>Durham</i>	129	In London the day before the adjournment day	ibid.
Case thereon	130	Cause now to be marked, if there be special jury as such	ibid.
<i>Lancaster</i>	129	Every cause to be tried in the order they stand	330
Cinque ports	ibid.	If plaintiff be hindered of a trial by a <i>ne recipiatur</i> , he may try at next sittings, on notice	ibid.
<i>Wales</i>	130	When <i>ne recipiatur</i> can or not be entered	ibid.
Common process to be served personally	ibid.	How to make a <i>remanet</i>	ibid.
Three things to be observed in filling up common process	ibid.	How to enter issue, and pass record in town	331
Service on return day regular	131	How in the country	ibid.
Service on husband, sufficient for both	ibid.	If record agrees with declaration variation from issue not material	332
Each defendant must be served	ibid.		
A common <i>latitat</i> not bailable	ib.		
<i>Præcipe</i>	132		
<i>Proclamation</i> 512.			
<i>Puis Darrein Continuance.</i>			
When to plead it	46	<i>Relicta verificatione</i>	408.
It is not allowed after demurrer determined, or verdict	ibid.	<i>Remittitur</i> of Damages.	
Cannot be rejected if verified by affidavit	47	Judgment by <i>nil dicit</i> in ejectment, with a <i>remittitur dampna</i>	491
<i>Record of Nisi Prius.</i>			
WHAT it is to contain	327	<i>Replication.</i>	
How to make up record upon a judgment of <i>respondens ouster</i> , and afterwards a plea in chief, and issue thereon	327	What time to reply on rule	286
How if there be a demurrer, and cause to be tried before it is disposed of	ibid.	How to compel plaintiff to reply	ibid.
		<i>Sunday</i> when accounted a day	287
		When a whole term's rule is necessary	ibid.
		Notice necessary	ibid.
		Rule	

I N D E X.

Rule to be given in term or 16 days after *Page* 287
 Replication withdrawn six terms after *ibid.*
 Replication and issue to a plea of *non assumpsit infra sex annos* 275
 The like to a plea of set-off 276
 The like to a plea of satisfaction 277
 The like denying a tender 279
 The like if he acknowledge the tender and goes for further damages *ibid.*
 Replication to a plea of *nul tiel record* 284

Re axit.

How to enter a *retraxit* of defendant's plea 408
 The entry in case *ibid.*
 The like in ejectment 569
 The attorney may do this, though said the contrary in many books; but it is every day's practice 408

Return of Writs, 80.

Rolls. Vide Docket, 363.

Rule to plead.

Antiently two rules 231
 Now reduced to one *ibid.*
 Rule cannot be given on Sunday *ibid.*
 Before plea compelled ought to be given, unless there be an order *ibid.*
 If rule be given and an amendment made in same term, no new rule necessary 232
 Till declaration filed, no rule ought to be given (out of the work) *ibid.*
 The form of the rule *ibid.*
 When rule expires *ibid.*
 Rule to plead may be given at any time in term, or four days after *ibid.*

How to apply for time to plead *Page* 232
 A month's time, a lunar month 233
 What is an issuable plea *ibid.*
 The clerk of the rules will accept it on the essoign day, but it cannot be entered till the first day of term 232
 When defendant ought to plead in all cases 234
 Within what time to plead if no proceedings for four terms 238
 When rule to be given 239
 A case on the point 238

Demanding Plea.

When necessary to be made 235
 A demand of plea *ibid.*
 Cannot be demanded till rule be given (out of the work) *ibid.*
 When not necessary to be made *ibid.*
 Demand of plea waiver of bail, unless they be justified *ibid.*
 Demand of plea before appearance or plaintiff has filed it, a nullity *ibid.*
 There must be a demand of plea against a prisoner in custody of the marshal 236
 Cannot sign judgment till the expiration of 24 hours from the time of the plea demanded *ibid.*
 Bad on back of declaration *ibid.*

Searching for Plea.

Where to be searched for 239
 How long defendant has to plead after demand made 205
 No demand is necessary to be made, where plaintiff has filed bail according to the statute, and given notice of the declaration *ibid.*
 Demand of plea is a waiver of bail, before put in *ibid.*
 It is necessary against a prisoner *ibid.*
 When a nullity *ibid.*

Rules

I N D E X.

Rules necessary to be known by Practisers, 83.

Rule for Judgment.

How to be given Page 347

The form *ibid.*

If cause be tried within term, may be given any time within four days after term, but cannot be given before the day in bank

348

Expires in four days after it is given (*Sunday* no day) 347

No rule upon a nonsuit, but costs may be taxed after the day in bank 348

Rule may be given by original on return day of *distringas* *ibid.*

May sign final judgment tho' the plaintiff be bankrupt *ibid.*

Death of either party *ibid.*

Sailor.

NO seaman shall be liable to be taken out of his Majesty's service, otherwise than for some criminal matter, unless the debt amount to 20*l.* 89

Plaintiff upon notice, &c. may enter a common appearance, &c. and proceed to judgment, &c. 90

Satisfaction.

How to enter satisfaction on record

529

Satisfaction piece 530

Where to be filed *ibid.*

Scire facias.

Of reviving judgment 429

A *sci. fa.* to revive secured to pay an annuity is an action, and an annuity must be inrolled or void *ibid.*

It is a judicial writ *ibid.*

In nature of an original *ibid.*

And held to be an action 430

An execution after year and day without *sci. fa.* not void, but voidable Page 430

Must be sued out in county where *venue* is *ibid.*

No *sci. fa.* necessary where defendant made the delay *ibid.*

So if there be a *cesset executio*, no *sci. fa.* necessary, but if not taken out within a year after *cesset* is determined, a *sci. fa.* necessary *ibid.*

If he delays by injunction not necessary *ibid.*

Computation of the year *ibid.*

If execution not returned, or filed, continuances cannot be entered *ibid.*

In no case where the parties are changed ought execution to go without a *sci. fa.* 431

If there be a recovery against a *feme sole*, and she is married, a *sci. fa.* *ibid.*

The husband cannot have execution for costs on a plea of coverture without a *sci. fa.* *ibid.*

On death of defendant judgment to be revived *ibid.*

The like on death of plaintiff *ibid.*

Necessary on nonsuit *ibid.*

If executor die, adm. *de bonis non* may have *sci. fa.* *ibid.*

If judgment against two, *sci. fa.* must be against both 432

If execution once sued, need not issue *sci. fa.* *ibid.*

It may be sued out of course in seven years, but afterwards a motion must be made at side bar *ibid.*

May be sued out if not above ten years on motion without affidavit *ibid.*

If above ten years affidavit *ibid.*

Execution cannot be sued out after judgment revived, if above a year and day *ibid.*

When a new *sci. fa.* is necessary *ib.*
When

I N D E X.

When an *alias* is requisite *P.* 432
Sci. fa. on which notice is given to
 lay four days 433
 Every first writ on which a *nihil* is
 returned to lay some time *ibid.*
Alias to lay four days *ibid.*
 And sheriff to indorse the day he
 receives it *ibid.*
 No *alias* to issue until the first
 writ be returnable *ibid.*
 Each to have seven days between
 the *teste* and return by bill *ibid.*
 By original fifteen days each *ibid.*
 The first *sci. fa.* left one day be-
 fore return good 434
 If it lays four days, summons on
 return day good before the court
 rises *ibid.*
 How to sue out *sci. fa.* *ibid.*
 Ought to be as short as possible
ibid.
Præcipe for *sci. fa.* *ibid.*
Scire facias in debt *ibid.*
 ——— case 435
 ——— trespass *ibid.*
 ——— ditto in trespass and
 assault 436
 ——— covenant *ibid.*
 Against an administratrix in case
ibid.
 The like against an executor 437
 How if three executors, and two
 are infants *ibid.*
 The like for an executor *ibid.*
 The like for an administrator *ib.*
 How to proceed on one *sci. fa.* if
scire feci be returned *ibid.*
 How to sign judgment by default
 438
 The entry of two *sci. fa.*'s *ibid.*
 The entry of one *sci. fa.* 439
 How to appear *ibid.*
 Declaration on *sci. fa.* 440
 What a sufficient certainty in a
sci. fa. *ibid.*
 When declaration may be entitled
ibid.
 Proceeding if appearance *ibid.*
 Cannot amend a *sci. fa.* *ibid.*

Where probate ought to be taken
 after final judgment, and before
 revivor *Page* 440
 The like of an administration 441
 A *sci. fa.* to revive a former
 judgment is so far a continuance
 of same action, that if plaintiff's
 testator agrees not to bring error
 in that former action, it shall
 bind his executors *ibid.*
Sci. fa. by a baron and feme on
 a judgment recovered by *feme*
 while *sole*, if after execution
 awarded she dies, it survives to
 the husband *ibid.*
 Judgment against a *feme sole* who
 after married, before execution
 the wife died, the husband is
 chargeable *ibid.*
 In ejectment, execution cannot be
 sued out after year and day,
 unless revived, and it must go
 against the ter-tenants as well as
 defendants *ibid.*
 Proceedings by original upon a
sci. fa. and *sci. fa.* thereon *ib.*
Teste and return inclusive of the
 fifteen days held good 442
 If the plaintiff dies after interlo-
 cutory judgment, it may be re-
 vived by his executor or admin-
 istrator, and so if defendant
 dies *ibid.*
 How to proceed thereon *ibid.*
Sci. fa. by an executor after an
 interlocutory judgment, and be-
 fore inquiry executed *ibid.*
 The like by an administrator (mar-
 gin) 443
 Declaration thereon 444
 How to appear *ibid.*
 If no appearance, how to sign
 judgment *ibid.*
 How to enter same after final
 judgment 445
Sci. fa. against an administrator of
 defendant, after interlocutory
 judgment, and before inquiry
ibid.
Scire

I N D E X.

<i>Scire facias against Bail.</i>	<i>Præcipe</i>	Page 453
By the terms of the recognizance they are bound to render at the end of the suit, therefore you may proceed by action or <i>sci. fa.</i>	As to the return of by, and original	ibid.
Page 446	When <i>alias</i> may be sued out	451
But before any proceedings a <i>ca. fa.</i> must be taken out, and lie four days in the office before the return	Rule for judgment by bill	453
ibid.	When judgment signed may sue out <i>fi. fa.</i> and <i>ca. fa.</i> against the bail, and may be levied on either or both	ibid.
No one action but a <i>ca. fa.</i> has effect to fix bail	Entry on the roll of the two <i>sci. fa.</i> 's and judgment	454
It is necessary to make entry of recognizance of bail previous to the <i>sci. fa.</i> or action	The like of one returned <i>sci. feci</i>	ibid.
How to proceed by action	If <i>sci. fa.</i> 's be of different terms, how to enter them	ibid.
The <i>ac. etiam</i> of the writ	How to appear	455
As to the venue	The form of the declaration	ibid.
Suing bail below pending error in parliament a contempt	Although the last <i>sci. fa.</i> be returnable last return, yet you may entitle declaration, as of the term generally	ibid.
As to the <i>teste</i> and return of <i>ca. fa.</i> by original	What bail may plead in their discharge	ibid.
The like by bill	How the replication on a plea of death of principal ought to conclude	456
Bail have eight entire days in full term to render in an action	Bail below not liable to costs in error	ibid.
ibid.	How to proceed by <i>sci. fa.</i> if action be by original	ibid.
If four only in one term, have eight the next in full term to render	Appearance to the <i>sci. fa.</i> by criminal	457
How much bail are liable for	Cannot levy costs on <i>sci. fa.</i> by original against the bail	ibid.
Explanation of the rule	If execution issue against bail, and no satisfaction, yet may take the principal. And if one of the principals be taken, and not the other, the bail are not discharged	ibid.
The bail are to pay costs on an action, as well as the sum sworn to	<i>Fi. fa.</i> in case against bail	ibid.
449	<i>Ca. fa.</i> in case	ibid.
Proceedings by <i>sci. fa.</i> against bail by bill	<i>Testatum fi. fa.</i> in case	ibid.
Venue	ca. fa.	ibid.
Entry of the recognizance of bail	<i>Fi. fa.</i> in debt	460
450	<i>Ca. fa.</i> in debt	ibid.
Roll and <i>ca. fa.</i> need not be filed till replication	Within what time the bail may render the principal	461
How to sue out <i>sci. fa.</i> by bill	May	
When to be tested by bill and original		
ibid.		
If you mean not to summon on the first, summons may be left on return day <i>sedente curia</i>		
ibid.		
<i>Sci. fa.</i> against bail in case		
ibid.		
The like in debt in margin		
ibid.		

I N D E X.

May render before *return* of the *ca. fa.* Page 461

If not on return of first *sci. fa.* if returned *sci. feci* *ibid.*

Or if an *alias*, on return day if by bill *ibid.*

If by original, on the *quarto die post* *ibid.*

If on an action, they have eight days in full term to render *next after return* *ibid.*

A bankrupt attending commissioners may be taken and rendered *ib.*

To render *quarto die post* of the return of second *sci. fa.* by original *sedente curia* *ibid.*

The rule with respect to the time of render to be construed strictly, therefore the defendant was rendered into the hands of a tipstaff on return day in the evening, held bad 462

If defendant is in custody, bail may have a *ba. corp.* to bring him up and render *ibid.*

If defendant becomes a bankrupt, and obtains his certificate *before bail fixed*, they may be exonerated *ibid.*

If he is in custody for felony, how to apply 463

Soldier and impressed man *ibid.*

How to render the defendant *ib.*

Notice to be given of the render *ib.*
If no notice given, yet if a render is made, they shall be exonerated upon payment of costs *ibid.*

How to exonerate bail after render 464

Notice of surrender *ibid.*

Affidavit of the service thereof *ibid.*

Surrender must be entered in the marshal's books *ibid.*

The bail may take the principal on a *Sunday*, and how *ibid.*

Of staying proceedings against bail where error is brought by the principal 465

Proceedings staid pending error *ib.*

If they apply in time, terms are that they pay, or render within four days after the affirmance

Page 465
If they do not apply in time, only four days to pay after affirmance *ibid.*

A writ of error stays all proceedings against the bail, so that you cannot ever call for the sheriff's return 466

Cannot get a *ca. fa.* returned by the sheriff, although a writ of error allowed after it was lodged *ib.*

If error is brought and no bail put in, court will not then stay proceedings against bail *ibid.*

If execution obtained against bail, court will not relieve pending error *ibid.*

Where no bail required in error, if the bail apply to stay the proceedings, they must undertake for the costs in error, as well as the condemnation money *ibid.*

Error brought in *B. R.* and afterwards in parliament, and then he suffered a nonpros on the first writ: court refused to stay the proceedings on the judgment pending the second writ *ibid.*

If error is brought for the purpose of delay, court will not stay the proceedings 467

If they undertake to pay four days after affirmance in the Exch. and error is brought in the house of lords after, it is that affirmance which is meant *ib.*

Court will discharge bail on defendant's becoming a peer *ib.*

Cognovit signed where defendant had consented that the bail should pay the debt; bail were exonerated *ibid.*

Bail in error cannot render the principal *ibid.*

Security for Costs. Page 166.
Set-off. Vide *Mutual Debts.* 251.
Plea of non assumpsit, and a set-off 272
Sheriffs.
How to compel them to return Writ and bring in the Body 153
 Formerly were tardy in returning their writs *ibid.*
 They were obliged to return their writs into court after term *ib.*
 Wilfully delaying the execution of the process, or having levied money should detain it, liable to attachment 154
 Not liable six months after expiration of his office to return writ *ibid.*
 A rule issued in vacation (irregular) tested of the next term *ib.*
 To return writ in six days, country *ibid.*
 In *London or Middlesex*, return the writ, and bring in the body in *four days* *ibid.*
 How to compel the sheriff to return writ, and bring in the body 155
 Affidavit of service of the rule to move for attachment *ibid.*
 Service of rule on the under-sheriff's agent in town bad *ibid.*
 But *qu.* as to agents for *Kent*, &c. *ibid.*
 Affidavit of service of rule to bring in the body where bail has been put in but not perfected 156
 The like where no bail put in *ibid.*
 How to draw up rule for the attachment *ibid.*
 Attachment a criminal process *ibid.*

When it may be moved for *Pa.* 156
 Affidavit must state that the original rule was shewn 157
 How to proceed against late sheriff *ibid.*
 The proceeding by distringas is now at an end 158
 Sheriff not liable to be called upon to return process unless within 6 lunar months, and the day on which he goes out of office is to be reckoned as part of the 6 months *ibid.*
 If sheriff be in contempt before the defendant's death, an attachment may issue *ibid.*
 Sheriff not liable to be called on to return writ, if not called on by rule within 6 months, altho' previous he was requested so to do *ibid.*
 Rules ought to keep pace with defendant's time 159
 The plaintiff has his election previous to the taking out the 2d rule to take the bond, or go against the sheriff *ibid.*
 If a trial be lost, court ordered attachment to lie as a security *ibid.*
 If sheriff be fixed and defendant has merits 160
 Bail put in after sheriff fixed, and *no trial lost*, court set aside attachment and suffered bail to justify *ibid.*
 Affidavit for an attachment where bail was put in, but not justified *ibid.*
 How to proceed against the coroner *ibid.*
 Attachment refused for not taking a replevin-bond 161
 Where sheriff liable to pay debt and costs *ibid.*
 How to proceed if sheriff goes out of his office *ibid.*
 New rule *ibid.*
 2 *Soldiers.*

I N D E X.

Soldiers.

No volunteer soldier liable to process, unless for criminal matter, or the debt is 20*l*. Page 90
 Plaintiff may, upon notice given, file common bail, and proceed to judgment for any debt, and also to an outlawry 92

Special Jury.

How to apply for a special jury 324
 Cannot strike *ex parte* till third appointment *ibid*.
 No costs of a special jury, unless the judge certifies *ibid*.
 May have a view *ibid*.
 None to take more than one guinea, unless a view *ibid*.
 Change of sheriffs no difference, if jury be once nominated 325
 New rule for setting down a special jury cause 329
Distingas for a special jury 334
 Who to make it out *ibid*.

Statute of Limitations.

When it begins to run 528
 The entry of a bill of *Middlesex* to save the statute of limitations *ibid*.
 The like of a *latitat* 529
 Docquet *ibid*.
 If once done, no necessity to do it again *ibid*.
 It may be continued in replication *ibid*.
 Averment necessary therein *ibid*.

Subpœna.

Subpœna to testify 334
Præcipe for ditto *ibid*.
Subpœna duces tecum where necessary 335
 Witnesses ought to have a reasonable time before attendance 337
 If there be not personal service, no attachment *ibid*.
 It witnesses come a distance off,

charges ought to be tendered

Page 337

Must be served personally *ibid*.
Subpœna duces tecum *ibid*.
 How to proceed if witness in prison 336
Ha. corp. ad testificandum *ibid*.
Præcipe for ditto 337
 Affidavit to ground it 627

Suggestion on Record.

Suggestion on the declaration of the death of one of the plaintiffs pursuant to the statute 635
 The like after issue joined 636
 The like of a defendant after verdict *ibid*.
 Suggestion was entered on the *nisi prius* record, of the death of one of the defendants in the *jurata*, after verdict; upon error being brought, it appeared rightly entered on the issue roll, and held not to be error *ibid*.

Suggestion on the Court of Conscience Act.

If an action be brought by one citizen against another, and he does not recover 40*s*. and the defendant proves that he was resident in the city, costs shall be allowed him 637
 To whom it is given *ibid*.
 The *Westminster* and most other acts must be pleaded *ibid*.
 The affidavit *ibid*.
 Who is within the description of this act 638
 If judgment goes by default, he shall not be allowed such suggestion *ibid*.
 The costs of the motion are to be allowed if suggestion goes *ibid*.
 What affidavit is necessary to ground the motion 639
 A set-off, reducing the demand to 40*s*. does not affect the jurisdiction *ibid*.
 But

I N D E X.

But when payments are given in evidence on the plea of *non assumpsit*, and verdict under 40s. a suggestion may be moved for

Page 639

The affidavit should state both to be resiant *ibid.*

Defendant to have costs whether plaintiff sue in his own right, or as personal representative *ib.*

Personal representative cannot be sued in the county court *ibid.*

Where there was a reference and award under 40s. allowed, no costs *ibid.* 640

Superfedeas. See title *Prisoners*, 602.

Surrender by Bail, 461.

Tenants in Common, 28.

Tender.

WHAT a tender is 263
Must be made before the writ sued out 264

Proof that defendant went purposely to pay rent, and said to plaintiff, I am come to pay you the rent; and also refused on other ground than that of the *quantum*, held to be a sufficient tender *ibid.*

A subpoena in Exchequer sued out before tender, good *ibid.*

How to plead it to an action in debt *ibid.*

The like in case *ibid.*

Tender of goods how to be pleaded 264

Every requisite which is in a particular case necessary to the validity of a tender, must be shewn to have been complied with, else not good *ibid.*

How to plead a tender of stock 265

When to plead a plea of tender *Page 265*

Tender to the whole declaration, good *ibid.*

Non assumpsit to the whole, and tender as to part, cannot be pleaded *ibid.*

Tender made in term the day bill filed, and before it was filed, declaration filed generally; summons to amend it by intitling it as of that day, judge said, it would not assist defendant 266

Fresh demand and refusal *ibid.*

If plaintiff takes money out of court, he may proceed on general issue for farther damages *ib.*

Tender by justices *ibid.*

In trespass *ibid.*

Distress for rent 267

A tender in any money coined at the mint, upon which there is the king's stamp, is good *ibid.*

To an avowry for damage feasant in replevin, tender must be pleaded to have been made before impounding *ibid.*

To an avowry for rent, plaintiff may plead a tender and refusal without bringing the money into court *ibid.*

If distress rightfully taken, cannot plead tender of rent and costs in bar of avowry for rent in any case, unless, &c. *ibid.*

If tender be pleaded with a *tout-jour pris*, and money brought into court, how to proceed *ib.*

Money cannot be taken out by defendant after verdict *ibid.*

If the money is not paid into court, may sign judgment *ibid.*

As to costs 268

Bank notes when a good tender *ib.*

Non assumpsit and plea of tender 278

Replication denying the tender and issue 279

Replication

I N D E X.

Replication if he takes money out of court, and goes for farther damages *Page 279*

Terms.

Why so called 77
Formed from the canonical constitutions of the church *ibid.*
When settled 78
Days in bank 79
Of *essoigns* *ibid.*
Michaelmas term and returns 80
Hilary *ibid.*
Easter *ibid.*
Trinity 81
Observations on the terms *ibid.*
When *Hilary* term begins and ends *ibid.*
Easter term *ibid.*
Trinity term *ibid.*
Michaelmas term *ibid.*
The first and last days of terms are appearance days 82
When no sittings *ibid.*

Teste and Return of Writs.

Observations on the returns *ibid.*
What writs must be returnable on days certain *ibid.*
What not 83
When need not be fifteen days between writ and return *ibid.*

Transitory Actions, 224.

Trial, Notice of.

Due notice in all cases 307
Country causes, 10 days notice of trial to be given *ibid.*
Eight days notice in *London* and *Middlesex* 308
Sunday when accounted as one *ib.*
When 14 days notice *ibid.*
Explanation for assizes 308
The like in *London* *ibid.*
Notice may be given against a prisoner to turnkey *ibid.*
When a term's notice *ibid.*
How to count the time *ibid.*

A notice of trial is a proceeding so as to prevent a term's notice *Page 309*

Must be given before *essoign* day *ibid.*

If a judge's order be obtained, no need of a term's notice ; but if a summons only, and no order, must *ibid.*

How the time is calculated *ibid.*

If defendant suspend a cause by injunction, plaintiff may proceed without a term's notice *ib.*

When new notice is requisite 310

Notice of trial to defendant when good *ibid.*

Notice of trial for *London* *ibid.*

The like for *Middlesex* *ibid.*

The like for the assizes *ibid.*

Notice for the special issue when to serve for the general issue *ibid.*

Trial by Proviso.

Fallen into disuse 310

The statute 7 & 8 W. 3 *ibid.*

Prohibition, quare impedit, replevin, &c. may have it *ibid.*

For why ordained *ibid.*

No trial by proviso, unless there be a default made *ibid.*

When defendant can make out the *venire* *ibid.*

The defendant must give plaintiff notice of trial *ibid.*

Plaintiff may also give notice 312

Master gives a rule for proviso *ib.*

Costs to be paid if defendant does not try his cause *ibid.*

If a record has been once carried down by plaintiff and new trial, it must be carried down by proviso *ibid.*

The rule if obtained before trial and after notice will do *ibid.*

How to put off Trial 313.

Affidavit *ibid.*
What

I N D E X.

What it ought to contain *Page* 314
 What will satisfy the court *ibid.*

Short Notice, 315.

Four days before commission day *ibid.*
 Of short notice *ibid.*
 Countermand in *London* or *Middlesex*, two days 315
 If defendant lives above forty miles, six days *ibid.*
 The form of a countermand *ibid.*
 Notice of continuance *ibid.*
 Cannot continue but once in a term *ibid.*
 If plaintiff does not proceed to trial pursuant to notice, he must pay costs 316
 Affidavit 317
 How to move 316
 Affidavit of demand and refusal of the payment of costs 317
 May move for attachment, and how *ibid.*

Trial at Bar.

Cannot be moved for until issue joined 321
 And must be by special jury *ibid.*
 Cannot be had in *London* *ibid.*
 Are allowed in issuable terms if, &c. 322
 Granted upon difficulty of title *ibid.*
 But not to be moved until issue joined *ibid.*
 Cannot be granted though consented to without leave *ibid.*
 What is a proper case *ibid.*
 Grounds are *length*, and *difficulties*, and as to costs *ibid.*
 Never allowed in an issuable term unless the crown be concerned *ibid.*
 On application for trial, court will exercise its own discretion *ibid.*
 Lessor being a privileged person, court refused that he might

name a good plaintiff

Page 322

If a judge be plaintiff, &c. granted of course 323
 The difficulty must be shewn; not enough to swear generally that there is value or difficulty there. *ibid.*
 Must be moved for on affidavit *ibid.*
 A special jury must be moved for *ibid.*
 May countermand *ibid.*
 With whom cause set down *ibid.*

New Trial.

When first granted 355
Venire de novo, when may be granted, and how new trials were introduced *ibid.*
 A general verdict can only be set right by a new trial *ibid.*
 Necessary to justice to reconsider the case 356
 Generally on payment of costs *ibid.*
 It depends on the discretion of court *ibid.*
 Trials by jury could not subsist without a power to grant new trials *ibid.*
 Description of a new trial *ibid.*
 If verdict be against evidence, yet if frivolous, and damage small, will not be granted 357
 Not to gratify litigious passions *ibid.*
 Nor for excessive damages, when under cognizance of jury *ibid.*
 Nor granted when the scales of evidence hang nearly equal *ibid.*
 Nor on nice or formal objections *ibid.*
 Nor on absence of witness if party could have had him *ibid.*
 Power of court to grant where there are excessive damages *ibid.*
 No

I N D E X.

No instance to grant on account of
witness being interested *Pa.* 357
If witnesses be interested it may
lay with the court to grant it

358

No new trial where it appears you
might have given evidence on
the former one *ibid.*

Evidence on both sides, no new
trial *ibid.*

On affidavit of jurymen *ibid.*

Motions are encouraged, and why
ibid.

When to be moved 359

None in penal actions *ibid.*

May grant for excessive damages *ib.*

Will not be granted to give an op-
portunity to prove the illegality
of a policy *ibid.*

Will not grant it to let defendant
into a defence apprized of at the
first trial *ibid.*

If justice be done, no new trial
ibid.

May be granted a second time
ibid.

May be granted in ejectment, and
after trial at bar *ibid.*

Refused in an action for a libel
ibid.

May be granted after a nonsuit
360

Seldom granted in actions for per-
sonal torts *ibid.*

It is sometimes granted without
costs *ibid.*

A writ of inquiry may be set aside
for smallness or excessive da-
mages *ibid.*

Dangerous to admit new evidence,
after it is known what was
sworn before *ibid.*

How to move for new trial *ibid.*

How to proceed if verdict set aside
361

Trespass. Vide Actions, 25.

Trover. Vide Actions, 23.

Venditioni exponas Page 392

Venire de novo, 355.

Venire facias, 47.

Venire facias 332

The like where there are two de-
fendants, and one lets judgment
go by default 333

Where sheriff is a party it must be
awarded to the coroner *ibid.*

Venue.

The derivation of the word 219

General rule of law respecting the
venue *ibid.*

Many niceties got over *ibid.*

Every *ven. fac.* in penal actions in
Lancaster, &c. to be awarded of
the body of the proper county
220

Real actions to be laid in the pro-
per county *ibid.*

Venue by bill is local or transitory
ibid.

If action arises in any county it is
transitory *ibid.*

When the laying of *venue* in a
wrong county is the loss of bail
ibid.

Personal actions, as debt, &c. may
declare in what county plaintiff
pleases *ibid.*

When the action is founded on
two things in different counties
both material to the maintenance
of the action, how *venue* to be
laid *ibid.*

Action on lease for rent, &c. *ibid.*

If cause of action arises partly in
one county and partly in ano-
ther, may be laid in either *ibid.*

If rent be received in *Middlesex*,
and account settled in *London*
222

If an assault happened abroad, may
lay *venue* in *London* *ibid.*

Actions on penal statutes must be
laid

I N D E X.

- laid in their proper county Page 222
- Construction of the act ibid.
- So against officers or justices 223
- Nuisance, and debt for rent, against the assignee are local ib.
- If no *venue* be laid in the body of the declaration, reference had to the margin ibid.
- But if proper *venue* be in the body, the word in the margin will not vitiate it ibid.
- Attorney plaintiff may lay *venue* in *Middlesex*, and cannot be changed, otherwise if defendant ibid.
- Debt for rent against lessee not local, otherwise against an assignee ibid.
- Of changing the *venue* in transitory actions 224
- Court will not change the *venue* to any of the four northern counties previous to the spring circuit ibid.
- In what cases the *venue* cannot be changed ibid.
- Refused in an action for a libel ibid.
- So in a written letter ibid.
- Venue* changed from *Chester* to *Salop* on reasons 225
- Libel written in one place and sent to another both in the same county, rule to change where it was both written and published ibid.
- Debt on bond made at *Derby*, administration by the Bishop of *Litchfield*, *venue* laid in *Derby* in the body: *London* in margin: on general demurrer held, it would not vitiate it ibid.
- Not settled whether court can change *venue* from an *English* county to a *Welsh* one ibid.
- Good reason to refuse *venue* being changed from an *English* county to the next *English* county, because affidavit cannot be departed from Page 225
- Venue* changed from *Middlesex* to *Wales*, no cause shewn 226
- Cannot be changed into a county palatine, but changed to *Chester* ibid.
- It cannot be changed, if it will delay the trial, as to *Bristol*, nor to a third county 226
- Nor where plaintiff is an attorney, and lays his action in *Middlesex*, otherwise if he lays it in *London* or elsewhere ibid.
- Nor because defendants are barristers ibid.
- In what cases it may be changed from a county at large to a city and county ibid.
- It cannot be changed to *Hull*, &c. nor to cities of *Worcester* or *Gloucester* ibid.
- Attorney defendant no privilege to change *venue* into *Middlesex* 227
- If attorney sues as executor, &c. or jointly, his privilege is lost ibid.
- Same respecting officers of the court ibid.
- Within what time *venue* may be changed ibid.
- Cannot move until appearance, nor after plea ibid.
- After issue it was changed ibid.
- Where changeable in transitory actions ibid.
- May be changed if defendant comes in on the *exigent* ibid.
- It is said, if he has time to move in one term, cannot do it in the next 228
- May be changed after order for time, but not if upon terms of short notice for first sittings ibid.
- Shall not after *essoign* of subsequent term be changed ibid.
- Plaintiff must move to discharge the rule before replication ib.
- Plaintiff

I N D E X.

Plaintiff cannot change the *venue*,
but he may do it by amending

Page 228

How to move to change *venue* 229
Affidavit *ibid.*

Upon plaintiff's undertaking to
give some matter in issue arising
in the county wherein the ac-
tion is laid, the rule to change
the *venue* will be discharged

ibid.

Venue was brought back after two
trials *ibid.*

Rule to pay money into court held
sufficient 230

How to change the *venue* in vaca-
tion *ibid.*

Formerly it was required to give
evidence in the county wherein
the *venue* was retained, or be
non-suited; but since, the plain-
tiff is bound only to give some
evidence, or be non-suited 231

If after rule to change the *venue*,
the plaintiff undertakes to bring
it back, must give evidence of
some matter in that county *ibid.*

Verdict, 350.

Special Verdict.

In special verdicts, counsel to sub-
scribe the points 351

Deeds to be found according to the
substance, shortly 352

How to proceed on a special ver-
dict *ibid.*

Copies of the whole record and
verdict to be made for the judges
ibid.

If judgment pronounced, no rule
is necessary *ibid.*

Special Case.

How to proceed 353
What it ought to state *ibid.*

View.

View may be granted in any

action where necessary Page 325
Six of the jurors or more shall
have a view 326

The construction of the act *ibid.*

How to obtain a rule for a view
ibid.

Shewers, their duty. *ibid.*

Wales.

NO arrest to be made in *Wales*,
unless the debt amounts to
20*l.* 88

If it is a *Welsh* issue, to be tried in
the next *English* county, how to
award the *venire* 305

Warrant of Attorney.

No bailiff, &c. to take any war-
rant, but in presence of an at-
torney 408

When an attorney must be pre-
sent, on taking a warrant of
attorney 409

Construction of the rule *E.* 15
Car. 2. *ibid.*

If confessed for more than is due
ibid.

Prisoner in execution paid part of
debt, and executed a new war-
rant, and held it well given,
though no attorney present *ib.*

When no necessity for an attorney
410

When there is *ibid.*

When judgment may be entered
up without motion *ibid.*

If ten years old, motion must be
made in court *ibid.*

How to enter it up if given to a
feme sole, who afterwards mar-
ries *ibid.*

If judgment be given to two, and
one dies before judgment en-
tered, leave will be given to the
survivor to enter it up *ibid.*

The court will order a warrant of
attorney to confess judgment to
be

I N D E X.

be delivered up, if obtained by
 fraud, before any use has been
 made of it Page 410
 Will not set it aside on account of
 its being given by a defendant
 in custody without an attorney
 being present on his part, if
 executed by the defendant pur-
 posely with a view to cheat the
 plaintiff 411
 If defendant die in vacation, may
 enter it up, for it has relation
 to the first day of the term *ibid.*
 Judgment entered by an attorney's
 clerk, who used the name of a
 regular attorney, set aside
ibid.
 Will not give leave to enter it of
 20 years standing *nunc pro tunc*
ibid.
 Warrant to confess given by a pri-
 soner in *Ireland*, is subject to
 the rule requiring an attorney
ibid.
 Warrant of one executor will not
 authorize for all 412
 Cannot be entered after plaintiff's
 death *ibid.*
 Warrant of attorney and release of
 errors, good in one instrument
ibid.
 Cannot enter it up after plaintiff's
 death, unless the words be to his
 executors, &c. *ibid.*
 How to apply in vacation *ibid.*
 How in term *ibid.*
 Affidavit *ibid.*
 How to sign judgment 413
 Memorandum *ibid.*
 If a bankrupt to gain his liberty,
 execute a new warrant and bond
 for same debt, it is an extin-
 guishment of the old debt, and
 certificate will not discharge it
414
 If given for a usurious demand,
 court will direct an issue *ibid.*

Witnesses.

Who are good witnesses Page 343
 Who not *ibid.*
 Interested 344
 How to compel them to appear
335
 If witnesses are going abroad,
 may be examined before a
 judge 337
 How to proceed in term *ibid.*
 The like in vacation 338
 The form of interrogatories for
 plaintiff 339
 The like for defendant 340

Writs.

Observations on the returns of
 writs 82
 Non juridical days are to be
 avoided in the different terms
ibid.
 11th November is not any return
ibid.
 What writs are to be returnable
 on day certain *ibid.*
 What not *ibid.*
 All writs issued out by original,
 not to be returnable on a day
 certain 83
 What writs need not have 15 days
 between the *teste* and return *ib.*
 All writs and processess grounded
 upon original writs must have 15
 days between the *teste* and return,
 except helped by stat. 16 Car.
 1. c. 6. s. 7.
 Returns of writs in the different
 terms 80
 Every day a good return by bill,
 except, &c. 81
Ca. sa. wherein any *exigent* after
 judgment is to be awarded, is
 to have 15 days 83
 So a *ca. sa.* to make bail liable,
 where proceedings are by origi-
 nal *ibid.*

F I N I S.

Esc. J. J.

